

No. 15912

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United States  
Court of Appeals  
for the Ninth Circuit

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CONTINENTAL TRADING, INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax  
Court of the United States.

FILED

MAY 2 1958

PAUL P. O'BRIEN, CLERK



No. 15912

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United States  
Court of Appeals  
for the Ninth Circuit

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CONTINENTAL TRADING, INC., Petitioner,

vs.

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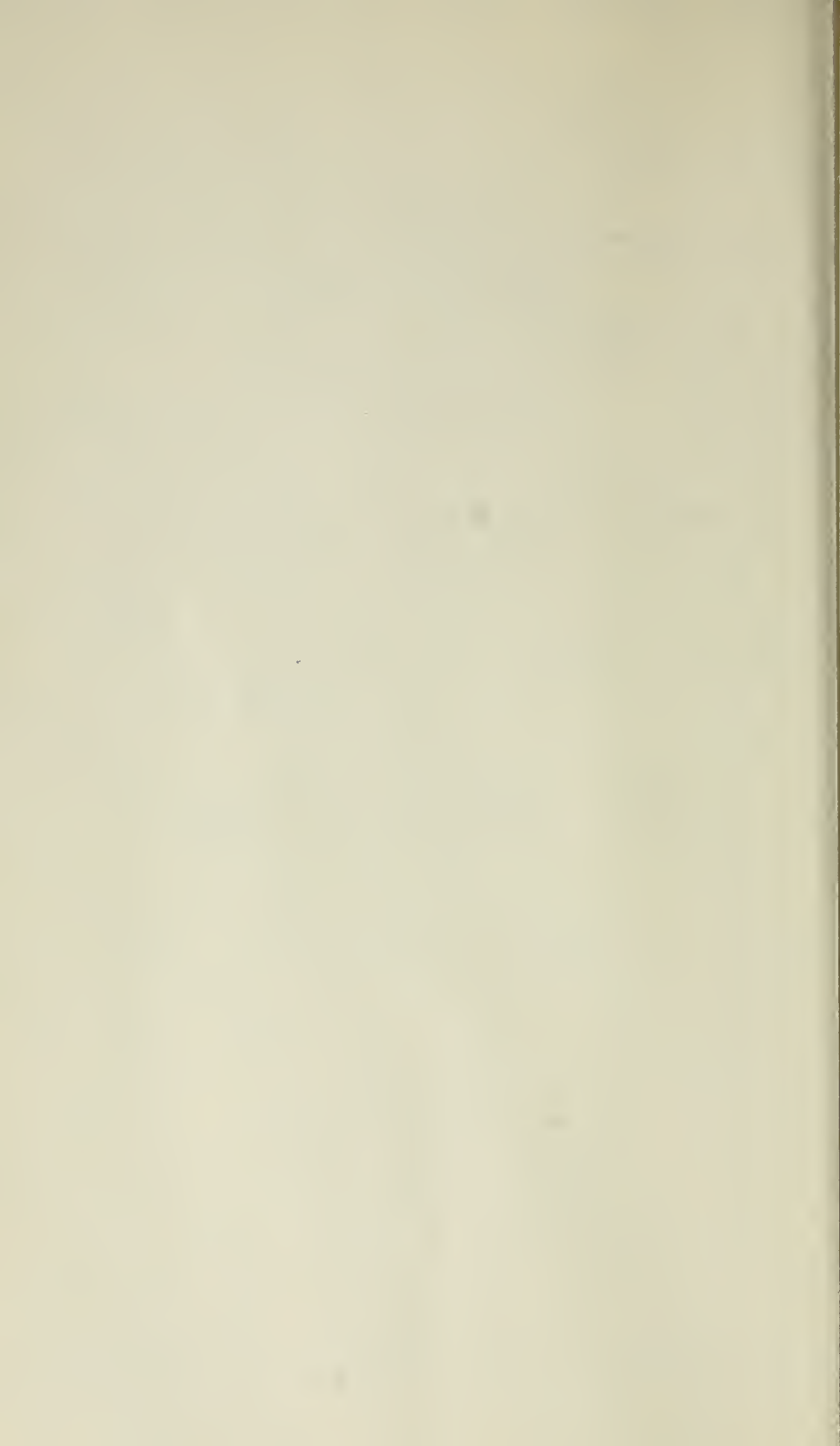
Transcript of Record

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Petition to Review a Decision of The Tax  
Court of the United States.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Petitioners.

CHARLES K. RICE,  
Assistant United States Attorney General,  
LEE A. JACKSON,  
Attorney,  
Department of Justice,  
Tax Division,  
Washington 25, D. C.,  
Attorneys for Respondent.



## APPEARANCES

### For Petitioner:

M. W. DOBRZENSKY,  
EDWARD B. KELLY,  
S. H. DOBRZENSKY.

### For Respondent:

FRED R. TANSILL,  
A. S. RESNIK.

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The Tax Court of the United States

Docket No. 55212

CONTINENTAL TRADING, INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1954

Nov. 4—Petition received and filed. Taxpayer notified. Fee Paid.

Nov. 5—Copy of petition served on General Counsel.

Dec. 21—Answer filed by General Counsel.

Dec. 21—Request for hearing in San Francisco, Calif. filed by General Counsel.

Dec. 30—Notice issued placing proceeding on San Francisco, Calif. calendar. Service of Answer and Request made.

1956

July 20—Hearing set 8/27/56, San Francisco, Calif.

1956

- Aug. 27—Hearing had before Judge Opper on merits, Stipulation of facts with Ex. I thru XXX-I, Supplemental Stipulation of Facts with Exhibits A, B & C, Second Supplemental Stipulation of Facts filed 8/31/56, filed at hearing. Briefs due 11/30/56; Replies due 12/31/56.
- Sep. 17—Transcript of Hearing 8/30/56 filed.
- Sep. 17—Transcript of Hearing 8/31/56 filed.
- Nov. 30—Brief filed by Petitioner. 12/21/56 served.
- Nov. 30—Motion to extend time to 12/20/56 to file brief, filed by Respondent. 12/4/56—Granted. Served 12/5/56.
- Dec. 3—Proof of service of Petitioner's opening Brief filed.
- Dec. 20—Brief filed by Respondent. 12/21/56 Served.

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- Jan. 23—Reply Brief filed by Petitioner. Served 1/24/57. (Served late 3/11/57.)
- Aug. 30—Memorandum findings of fact and opinion rendered. Judge Opper. Decision will be entered for the Respondent. Served 9/3/57.
- Sep. 4—Decision entered, Judge Opper, Div. 14. Served 9/6/57.
- Sep. 24—Motion by petitioner to vacate decision. 10/1/57—Denied. Served 10/1/57.
- Sep. 24—Motion by petitioner for reconsideration. 10/1/57—Denied. Served 10/1/57.
- Nov. 8—Entry of appearance of Fred R. Tansill, as counsel, filed.

1957

- Nov. 19—Motion by petitioner for leave to file motion to vacate decision, to reopen proceeding and to take further testimony, motion to vacate decision, to reopen case, and to take further testimony, lodged, affidavit attached. Denied 11/27/57. Served 12/5/57.
- Nov. 21—Notice of hearing Nov. 27, 1957, at Wash., D. C. on petitioner's motion. Served 11/21/57.
- Nov. 27—Hearing on petitioner's motion to file motion to vacate decision, to reopen case and take further testimony. Petitioner's oral motion to continue—Denied 11/27/57.
- Dec. 3—Petition for Review by U. S. Court of Appeals for the Ninth Circuit, filed by petitioner.
- Dec. 3—Notice of filing petition for review with proof of service thereon, filed.
- Dec. 4—Transcript of Hearing 11/27/57 filed.
- 1958
- Jan. 9—Motion by petitioner for extension of time for filing record on review and docketing petition for review for 50 days, filed.
- Jan. 9—Order extending time for filing record on review and docketing petition for review to Mar. 3, 1958.
- Feb. 21—Designation of contents of record, with proof of service thereon, filed.
- Feb. 21—Statement of Points, with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DEFICIENCY  
DETERMINATION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by Respondent in his Notice of Deficiency (Internal Revenue Service symbols Ap:SF:AA:DRU 150-D. GEW) dated June 28, 1954, and as a basis of its proceedings, alleges as follows:

1. Petitioner is a corporation incorporated, organized and existing under the laws of the Republic of Panama, with its principal office presently located at 107 Bis Paseo de la Reforma, Mexico, D.F. in the Republic of Mexico. The returns with respect to which the deficiency herein is asserted by Respondent were filed with the Collector of Internal Revenue for the 1st District of California, at San Francisco, California.

2. The notice of deficiency, a copy of which, marked Exhibit A, is annexed hereto, was mailed to Petitioner at Mexico, D.F. on June 28, 1954.

3. The deficiency as determined by Respondent is in income taxes for the calendar years 1948, 1949 and 1950, in the aggregate amount of \$474,328.83, all of which is in dispute.

4. The determination of tax as set forth in said Notice of Deficiency is based upon the following errors:

(a) Although, during the calendar years 1948,



1949 and 1950, Petitioner, a foreign corporation, was actually engaged in trade or business within the United States within the meaning of Section 231 of the Internal Revenue Code, Respondent erroneously held that Petitioner was a foreign corporation not engaged in trade or business within the United States and subject to income tax liability under the provisions of Section 231 of the Internal Revenue Code.

(b) Respondent erroneously disallowed all deductions for interest, expenses and loss on sale of property and the dividends received credit under Section 26 (b)(1) of the Internal Revenue Code for the years 1948, 1949 and 1950, as claimed in Petitioner's income tax returns for said years, on the grounds that Petitioner was not engaged in trade or business within the United States and that such deductions were not connected with income derived from sources within the United States.

(c) In determining whether the numerous, important and varied, lawful business transactions and activities in which Petitioner engaged and carried on during the years 1948, 1949 and 1950 in the United States and through its office in the United States under the direction and control of its President, assisted by a Vice President and Assistant Treasurer, all of whom were citizens and residents of the United States, Respondent erroneously failed to view the composite picture of Petitioner's said business activities and transactions in the United States or to treat same as an integrated whole, but

considered said business transactions and activities separately and analyzed each such activity apart.

5. The facts upon which the Petitioner relies as the basis of this proceeding are:

(a) In each of the calendar years 1948, 1949 and 1950, Petitioner was a corporation incorporated, organized and existing under the laws of the Republic of Panama.

(b) On March 13, 1948, Petitioner qualified as a foreign corporation in and under the laws of the State of Nevada and from that date to and including all of the calendar year 1950, remained qualified as such and from the date of its qualification and continuously thereafter and including the calendar year 1950, maintained a business office in Oakland, California.

(c) At all times during the calendar years 1948, 1949 and 1950, Petitioner's Articles of Incorporation provided (among other things) that the purposes for which Petitioner was established were:

“To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of live stock; to manufacture, lease,

buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale, transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

“To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon.”

(d) At all times during the calendar years 1948, 1949 and 1950, Petitioner's By-Laws provided:

“Section 2. President.—The president shall be the chief executive officer of the corporation, and shall preside at all meetings of the stockholders and directors. He shall have general and active management of the business of the corporation, subject to the board of directors, and shall see that all orders

and resolutions of the board are carried into effect. He shall execute contracts and other obligations authorized by the board, and may, without previous authority of the board, make such contracts as the ordinary business of the corporation shall require. He shall have the usual powers and duties vested in the office of president of a corporation, but may delegate any of his powers to the vice-president. He shall have power to select and appoint all necessary officers and servants of the corporation, except those selected by the board of directors, and to remove all such officers and servants, except those selected by the board of directors, and make new appointments to fill the vacancies.”

(e) At all times during which Petitioner maintained such business office at Oakland, California, said office and the business affairs of Petitioner in the United States and abroad were under the direct management and control of Petitioner’s President who, during all of said time, was assisted in the transaction of Petitioner’s business in and from said office in Oakland, California, by Petitioner’s Vice President (who served until the latter portion of 1950) and by Petitioner’s Assistant Treasurer, all of whom were citizens of the United States, residing in or immediately adjacent to Oakland, California. None of said officers was ever a shareholder of Petitioner.

(f) At all times during the calendar years 1948, 1949 and 1950, and while Petitioner maintained its said business office at Oakland, California, and

transacted its business in and from the same, Petitioner's President exercised broad discretionary powers in the transaction of its business and in the management and conduct of its affairs and business in the United States.

(g) During said years 1948, 1949 and 1950, Petitioner was engaged in trade or business within the United States, as hereinafter shown.

(h) During each of the calendar years 1948, 1949 and 1950, more than fifty per cent (50%) of Petitioner's gross income was derived from sources outside the United States. Petitioner's gross income reported in its income tax return, from sources within the United States for each of said years was:

| Year       | Amount       |
|------------|--------------|
| 1948 ..... | \$817,791.39 |
| 1949 ..... | 605,635.10   |
| 1950 ..... | 446,863.19   |

(i) During the calendar years 1948, 1949 and 1950, Petitioner, among other things, transacted the following principal items of business through its said office in Oakland, California, under the direction of and by and through its aforesaid resident corporate officers:

(1) Borrowed, in a series of transactions, a total of \$9,306,000.00 from financial institutions in the United States and secured said borrowings by the hypothecation in the United States of Petitioner's securities. Said sums were borrowed and used by



Petitioner for the purposes of Petitioner's business:

(2) Made principal repayments on its said borrowings, from time to time, which said repayments aggregated the sum of \$5,580,000.00;

(3) Made numerous payments of interest on its said borrowings, from time to time, which said interest payments aggregated the sum of \$278,989.65;

(4) Sold securities from its portfolio of securities for the aggregate sum of \$538,119.40;

(5) Collected dividends from its stocks in United States Corporations, organized and existing under the laws of states of the United States, aggregating \$1,867,384.70;

(6) Purchased from a processor one carload of butterfat for the total sum of \$46,212.75 and resold the same;

(7) Received from purchasers separate written purchase orders from time to time, for over 90 carloads of tin cans; issued its own purchase orders, from time to time, for said tin cans to a manufacturer of said cans and sold said cans and caused said cans to be shipped to the purchasers thereof; invoiced the purchasers of said cans for the price thereof, collected the amounts of said invoices and deposited the same in its bank accounts in the United States; received invoices for the said cans which it purchased and paid the manufacturer of said cans for its price thereof. The total sales price of said cans so sold was \$223,996.73.

(8) Sold various items of merchandise to customers in Mexico, which said items Petitioner purchased in the United States and caused to be shipped to said customers in Mexico;

(9) Maintained its bank accounts in banks within the United States, in which all receipts and gross income from sources within the United States were deposited. Drew checks against one of said accounts, signed by Petitioner's President and its Vice President or Assistant Secretary, over 200 in number, which aggregated the sum of over \$2,300,000.00 during the years 1948, 1949 and 1950;

(10) Prepared and filed its income tax and other tax returns and paid the taxes thereon;

(11) During said years 1948, 1949 and 1950, Petitioner's President, in and from Petitioner's said office in Oakland, California, exercising wide discretionary powers in actively directing Petitioner's affairs and business, both within and outside the United States, kept in touch with Petitioner's business affairs, office and officers in Mexico, D.F. and elsewhere by air mail letter, telephone and telegraph, and by means of numerous trips which he made to Mexico and to other places in Central and South America;

(12) The value of Petitioner's portfolio of United States securities, at the time it commenced to transact business in the United States and before any thereof were sold, exceeded the sum of \$7,000,000.00.

Wherefore, Petitioner prays that the Court may hear the proceedings and determine that there is no deficiency for any of said years 1948, 1949 or 1950.

Dated: October 28, 1954.

/s/ M. W. DOBRZENSKY,

/s/ EDWARD B. KELLY,

/s/ S. H. DOBRZENSKY,

Counsel for Petitioner.

Duly Verified.

(Copy)

Regional

Appellate Division—San Francisco Region

Room 1010, 870 Market Street

San Francisco 2, California

Ap:SF:AA:DRU

150-D:GBW

June 28, 1954

Continental Trading Inc.

107 Bis Paseo de la Reforma

Mexico City, D. F.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, December 31, 1949 and December 31, 1950, disclosed deficiencies in tax aggregating \$474,328.83 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax



Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 150th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 1010, 870 Market Street, San Francisco 2, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,  
Commissioner,  
By Wm. G. Wilker,  
Special Assistant,  
Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form

## STATEMENT

Ap:SF:AA:DRU  
150-D:GBW

Continental Trading Inc.  
107 Bis Paseo de la Reforma  
Mexico City, D. F.

Tax Liability for the Taxable Years Ended December 31, 1948,  
December 31, 1949 and December 31, 1950

| Year   | Income Tax          |                    |                     |
|--------|---------------------|--------------------|---------------------|
|        | Liability           | Assessed           | Deficiency          |
| 1948   | \$247,090.65        | \$38,790.06        | \$208,300.59        |
| 1949   | 180,637.56          | 29,077.85          | 151,559.71          |
| 1950   | 132,487.20          | 18,018.67          | 114,468.53          |
| Totals | <u>\$560,215.41</u> | <u>\$85,886.58</u> | <u>\$474,328.83</u> |

In making this determination of your income tax liability, careful consideration has been given to your protest filed January 18, 1954 and to the statements made at the conferences held on May 6, 1954 and June 3, 1954.

A copy of this letter and statement has been mailed to your representative, Mr. M. W. Dobrzensky, 1516 Central Bank Building, Oakland 12, California, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Net Income

Year: 1948

|   |                     |
|---|---------------------|
| Net income as disclosed by return .....                           | \$680,527.54        |
| Unallowable deductions and additional income:                     |                     |
| (a) Various deductions .....                                      | 137,263.85          |
| (b) Less from sale of property other than<br>capital assets ..... | 5,844.11            |
| Gross income as revised .....                                     | <u>\$823,635.50</u> |

## Explanation of Adjustments

(a) and (b) Your returns were filed on the basis that you were a foreign corporation but engaged in trade or business in the United States during the years 1948, 1949, and 1950; and the tax liabilities shown on your returns were computed under the provisions of sections 13 and 14, Internal Revenue Code.

On the basis of information submitted and after consideration of the contentions raised in the protest filed by you, it is held that you are a foreign corporation not engaged in trade or business within the United States and subject to income tax liability determined under the provisions of section 231, Internal Revenue Code.

In accordance with section 231 there are excluded from your taxable income the miscellaneous gains derived from sales of property in 1949 and 1950 as reported on your returns. In accordance with section 232 there are disallowed all deductions for interest, expenses and loss on sale of property for years 1948, 1949 and 1950 as claimed on your returns on the ground that such deductions were not connected with income derived from sources within the United States.

Computation of Income Tax

Year: 1948

|   |              |
|---|--------------|
| Gross income .....                                | \$823,635.50 |
| Dividends received credit .....                   | 0.00         |
| <hr/>   |              |
| Gross income subject to income tax .....          | \$823,635.50 |
| Income tax at 30% .....                           | \$247,090.65 |
| Income tax assessed                               |              |
| Account No. 4101435, First California District .. | 38,790.06    |
| <hr/>   |              |
| Deficiency in income tax .....                    | \$208,300.59 |

Adjustments to Net Income

Year: 1949

|   |              |
|---|--------------|
| Net income as disclosed by return .....       | \$510,137.85 |
| Unallowable deductions and additional income: |              |
| (a) Various deductions .....                  | 95,497.25    |
| <hr/>   |              |
| Total .....                                   | \$605,635.10 |
| Nontaxable income and additional deductions:  |              |
| (a) Other income .....                        | 3,509.90     |
| <hr/>   |              |
| Gross income as revised .....                 | \$602,125.20 |

Explanation of Adjustments

- (a) Various deductions in the sum of \$95,497.25 are disallowed as explained in income adjustments for the year 1948.
- (b) The amount of \$3,509.90 representing other income in the United States is eliminated from gross income.

## Computation of Income Tax

Year: 1949

|   |              |
|---|--------------|
| Gross income .....                        | \$602,125.20 |
| Dividends received credit .....           | 0.00         |
| <hr/>                                     |              |
| Gross income subject to income tax .....  | \$602,125.20 |
| Income tax at 30% .....                   | \$180,637.56 |
| Income tax assessed                       |              |
| Account No. 410007, District Nevada ..... | 29,077.85    |
| <hr/>                                     |              |
| Deficiency in income tax .....            | \$151,559.71 |

## Adjustments to Net Income

Year: 1950

|   |              |
|---|--------------|
| Net income as disclosed by return .....       | \$361,407.52 |
| Unallowable deductions and additional income: |              |
| (a) Various deductions .....                  | 85,455.67    |
| <hr/>   |              |
| Total .....                                   | 446,863.19   |
| Nontaxable income and additional deductions:  |              |
| (a) Other income .....                        | 5,239.19     |
| <hr/>   |              |
| Gross income as revised .....                 | \$441,624.00 |

## Explanation of Adjustments

(a) Various deductions in the sum of \$85,455.67 are disallowed as explained in income adjustments for the year 1948.

(b) The amount of \$5,239.19 representing other income in the United States is eliminated from gross income.

## Computation of Income Tax

Year: 1950

|  |              |
|--|--------------|
| Gross income .....                         | \$441,624.00 |
| Dividends received credit .....            | 0.00         |
| <hr/>                                      |              |
| Gross income subject to income tax .....   | \$441,624.00 |
| Income tax at 30% .....                    | \$132,487.20 |
| Income tax assessed                        |              |
| Account No. 4280201, District Nevada ..... | 18,018.67    |
| <hr/>                                      |              |
| Deficiency in income tax .....             | \$114,468.53 |

Served Nov. 5, 1954.

[Endorsed]: T.C.U.S. Filed Nov. 4, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a), (b) and (c) Denies the allegations of error contained in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (f), inclusive. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (b) to (f) inclusive, of paragraph 5 of the petition.

(g) Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

(i) Denies the allegations contained in subparagraph (i) and all subparagraphs thereunder, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ R. P. HERTZOG, G.M.

Acting Chief Counsel,

Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,  
T. M. Mather, Assistant Regional Counsel,  
A. S. Resnik, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Dec. 21, 1954.

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[Title of Tax Court and Cause.]

### STIPULATION

It Is Hereby Stipulated and Agreed by and between the Commissioner of Internal Revenue and the above named taxpayer, by and through their respective attorneys, that the following facts should be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy:

1. Petitioner is a corporation, incorporated, organized and existing under the laws of the Republic of Panama on May 28, 1947, with its principal office located at No. 107 Bis Paseo de la Reforma, Mexico, D.F., in the Republic of Mexico. The returns with respect to which the deficiencies herein are asserted by Respondent were filed by



the Petitioner as follows: The return for 1948 was filed with the Collector of Internal Revenue at San Francisco instead of with the Collector at Reno, Nevada, and the returns for 1949 and 1950 were filed with the Collector of Internal Revenue for the District of Nevada, at Reno, Nevada.

2. The said income tax returns filed by Petitioner as aforesaid set forth that more than 50% of petitioner's gross income was derived from sources outside the United States, and reported Petitioner's gross income from sources within the United States for each of said years as follows:

| Year       | Amount       |
|------------|--------------|
| 1948 ..... | \$817,791.39 |
| 1949 ..... | 605,635.10   |
| 1950 ..... | 446,863.19   |

3. The notice of deficiencies, a copy of which, marked Exhibit A, is annexed to the petition, was mailed to Petitioner at Mexico D.F. on June 28, 1954.

4. The deficiencies, as determined by Respondent, are in income taxes for the calendar years 1948, 1949 and 1950, in the aggregate amount of \$474,328.83, all of which is in dispute.

5. At all times during the calendar years 1948, 1949 and 1950 Petitioner's Articles of Incorporation provided, among other things, that the purposes for which Petitioner was established were:

"To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds

of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of livestock; to manufacture, lease, buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale, transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

“To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon.”

6. At all of the times during the calendar years



1948, 1949 and 1950, Petitioner's By-Laws, among other things, provided the matters and things set forth in Exhibit I, which is annexed hereto and hereby made a part hereof.

7. That at all times during the calendar years 1948, 1949 and 1950,

(a) Grover D. Turnbow, who is a citizen of the United States and a resident of the City of Piedmont, County of Alameda, State of California, and who maintained offices at 1106 Broadway, Oakland 12, California, was the President of Petitioner, International Dairy Supply Co. and International Dairy Engineering Co., referred to in paragraphs 9 and 10 of this Stipulation. International Dairy Association, Inc. also maintained its offices at 1106 Broadway, Oakland, California, in the same suite of offices occupied by said Grover D. Turnbow, and their names appeared in the office directory of said building and on the door leading into the suite of offices occupied by said Grover D. Turnbow.

(b) At all times during the years 1948, 1949 and until the end of 1950, M. W. Dobrzensky, a citizen of the United States and a resident of the City of Piedmont, County of Alameda, State of California, with offices at 436 Fourteenth Street, Oakland, California, and said M. W. Dobrzensky was an attorney at law and a member of the firm of Fitzgerald, Abbott & Beardsley.

(c) At all times during the calendar years 1948, 1949 and 1950, Marion O. Palmer was the secretary to Grover D. Turnbow, occupying offices with

him in said suite of offices at said 1106 Broadway, Oakland, California.

8. Neither said Grover D. Turnbow nor said M. W. Dobrzensky nor said Marion O. Palmer owned any of the shares of stock of Petitioner.

9. International Dairy Supply Company is a corporation which was incorporated under the laws of Nevada on February 3, 1948. At all times after its incorporation and during 1948, 1949 and 1950, Grover D. Turnbow was the President thereof and the owner of all of its issued and outstanding capital stock. Said corporation was engaged in supplying recombined dairy products to the U. S. Armed Forces in the Far East, pursuant to a contract dated July 1, 1948, identified as No. W-11-027-QM-99649, O.I.F.H. 1225 SHD.

10. International Dairy Engineering Co. is a California corporation, incorporated on the 1st day of July, 1950, and at all times thereafter Grover D. Turnbow was President thereof and the owner of all of its issued and outstanding capital stock.

11. International Dairy Association, Inc. is a Panamanian Corporation, incorporated in the year 1946, and at all times thereafter Grover D. Turnbow was the owner of 10% of its outstanding capital stock.

12. As shown by Exhibit II, which is annexed hereto, incorporated herein and hereby made a part hereof, Petitioner qualified as a foreign corporation in the State of Nevada on March 13, 1948 and remained qualified as such during the remainder of the year 1948, and during the calendar years 1949

and 1950. Petitioner withdraw from the State of Nevada as a foreign corporation on or about March 31, 1951. Petitioner never qualified as a foreign corporation authorized to do intrastate business in any other state in the United States.

13. As shown by Exhibit III, which is annexed hereto, incorporated herein and hereby made a part hereof, Nevada Agency and Trust Company, a corporation, whose business, among other things, was to act as Resident Agent for foreign corporations, with offices in the Cheney Building at 139 North Virginia Street, Reno, Nevada (P.O. Box 2540), acted as Resident Agent of Petitioner in the State of Nevada.

14. After March 13, 1948 and during the calendar years 1949 and 1950, Petitioner maintained a checking account with First National Bank of Nevada at Reno, Nevada, and starting with the 18th day of March, 1948, and during the remainder of that year and during the years 1949 and 1950, drew a total of 179 checks against said bank account. All of said checks were paid by said drawee bank. Annexed hereto, hereby made a part hereof and marked Exhibit IV, is a list of all checks drawn by Petitioner as aforesaid against said First National Bank of Nevada at Reno, showing the number of each check, the date thereof, the inscription on the voucher thereof, and the amount of each such check.

15. In the years 1948, 1949 and 1950, Petitioner maintained a checking account with Bank of America N.T. & S.A. in San Francisco, California, and

starting with May 23, 1948, made 20 withdrawals therefrom. Annexed hereto, made a part hereof and marked Exhibit V is a list of all checks drawn against said Bank of America, showing check number, date of each check, to whom and for what payable, and the amount thereof. Each of said checks was paid by the drawee bank.

16. In the calendar years 1948, 1949 and 1950:

### I.

(1) On January 1, 1948, Petitioner was indebted to Bank of America N.T. & S.A. at San Francisco, California, in the principal sum of \$1,100,000.00, evidenced by Petitioner's promissory note of December 31, 1947, the original of which said note is annexed hereto, made a part hereof and marked Exhibit VI. Installments of interest on said note were paid by Petitioner to said bank on the several dates shown by the endorsements of interest payments appearing on the back of said promissory note.

(2) As shown by Exhibit VII, which is annexed hereto, and hereby made a part hereof, Petitioner's said note of December 31, 1947 was secured by a pledge of 55,000 shares of Servel, Inc. common stock and 258,700 shares of common stock of Electrolux Corporation owned by it.

### II.

(1) On May 21, 1948 at San Francisco, California, Petitioner made, executed and delivered unto Bank of America N.T. & S.A. its promissory

note for the sum of \$1,000,000.00, evidencing a loan by said Bank of America to Petitioner in said sum. Said note was secured by a pledge of even date therewith, the original of which Pledge is annexed hereto, made a part hereof, and marked Exhibit VIII.

(2) Annexed hereto, made a part hereof and marked Exhibit IX is a copy of the letter of transmittal of May 20, 1948 from Petitioner to said bank, transmitting to said bank the aforesaid note, pledge and pledgeholders' agreement and other instruments evidencing and securing said loan. Annexed hereto, made a part hereof and marked Exhibit X is a copy of the letter from said bank to Petitioner, bearing date May 22, 1948, acknowledging receipt of the instruments transmitted in Petitioner's said letter of May 20, 1948.

(3) Annexed hereto and hereby made a part hereof and marked Exhibit XI is the original of Petitioner's said promissory note of May 21, 1948, on the reverse side of which note are endorsements by the payee showing the date and amount of payments by Petitioner of the interest and principal thereon, and showing that on September 8, 1949 said note was refinanced by Petitioner's promissory note of September 8, 1949 in the principal sum of \$1,700,000.00, after payment of \$150,000.00 on the balance of said note as of September 8, 1949.

### III.

(1) On August 6, 1948 at San Francisco, California, Petitioner made, executed and delivered to



Bank of America N.T. & S.A. its promissory note in the principal sum of \$1,850,000.00. Said note was secured by said 55,000 shares of Servel, Inc. common stock, by said 258,700 shares of Electrolux Corporation common stock, plus an additional 45,000 shares of Electrolux common stock. Said note was given to evidence Petitioner's indebtedness of \$1,850,000.00, evidencing a loan by said bank to Petitioner. The original of said note is annexed hereto, made a part hereof and marked Exhibit XII, along with the endorsements on the back thereof, showing dates and amounts of payments by Petitioner of installments of principal and interest thereon. As shown by the last endorsement appearing on the reverse of said note, the balance thereof as at September 8, 1949 was refinanced by Petitioner's promissory note of September 8, 1949, payable to said Bank of America in the amount of \$1,700,000.00.

(2) Annexed hereto, made a part hereof and marked Exhibit XIII is an advice from said Bank of America to Petitioner, bearing date August 6, 1948, showing a distribution of the proceeds of said note of August 6, 1948 in the principal sum of \$1,850,000.00 as follows: The application of \$1,100,000.00 to the payment of Petitioner's said promissory note of December 31, 1947 in the sum of \$1,100,000.00, and the credit to Petitioner's account in said bank of the sum of \$750,000.00.

#### IV.

(1) On September 8, 1949 Petitioner made, exe-

cuted and delivered to Bank of America N.T. & S.A. at San Francisco, California, its promissory note in the principal sum of \$1,700,000.00, evidencing the loan by said bank to Petitioner of said sum. Said note was secured by a pledge of said 55,000 shares of the common stock of Servel, Inc. and 303,700 shares of the common stock of Electro-lux Corporation. The original of said note of September 8, 1949, together with endorsement of Petitioner's payments of installments of interest and principal thereon, appearing on the reverse thereof, is annexed hereto and made a part hereof and marked Exhibit XIV.

(2) Annexed hereto, made a part hereof and marked Exhibit XV is a copy of the Pledge Agreement of September 8, 1949 which accompanies said promissory note.

(3) Annexed hereto, made a part hereof and marked Exhibit XVI is a letter from Bank of America N.T. & S.A. at San Francisco, California, dated September 2, 1949, showing a proposal from said bank preceding the said loan of September 8, 1949 and Petitioner's letter of August 31st, 1949 to which it replies.

(4) Annexed hereto, made a part hereof and marked Exhibit XVII is a copy of a letter from Petitioner dated September 8, 1949, addressed to said Bank of America N.T. & S.A. with respect to said loan of September 8, 1949 and enclosing the documents therein enumerated, which said copy of letter bears the receipt of said bank, dated September 8, 1949.

(5) As shown by the endorsement appearing on the face of said note, the same was paid by Petitioner on January 3, 1950.

#### V.

In the month of December, 1949, petitioner sold 10,000 shares of the capital stock of Servel, Inc., which 10,000 shares was part of the 55,000 shares thereof pledged to said Bank of America N.T. & S.A. as security for the indebtedness of Petitioner to said bank. Said sale was made through Land Title Bank & Trust Company of Philadelphia, Pa., to Mr. Paul Jones for a total price of \$95,000.00. Petitioner caused \$66,500.00 thereof to be credited against its \$1,700,000.00 note with Bank of America N.T. & S.A. Annexed hereto, made a part hereof and marked Exhibit XVIII (1), (2) and (3) are the documents which show consummation of such sale of said 10,000 shares of the capital stock of Servel, Inc.

#### VI.

In the month of December, 1949, Petitioner sold the remaining 45,000 shares of capital stock of Servel, Inc.

(1) One lot of 5300 shares was sold on or about December 13, 1949 for \$52,648.91, of which \$15,794.91 was transmitted by Bank of America to Petitioner's bank account at First National Bank of Nevada at Reno, Nevada, and the balance thereof, \$36,854.00, was credited on Petitioner's note for \$1,700,000.00.

(2) Another lot of said stock, comprising 3200



shares, was sold by Petitioner on or about December 15, 1949 for the aggregate sum of \$31,818.38, of which Bank of America N.T. & S.A. transmitted \$9,546.38 for deposit to Petitioner's account with First National Bank of Nevada at Reno, and credited \$22,272.00 upon Petitioner's said promissory note for \$1,700,000.00.

(3) On or about December 16, 1949, Petitioner sold 2,000 shares of said Serval stock for a total sum of \$19,861.09, of which Bank of America N.T. & S.A. transmitted \$5,959.09 for deposit to the account of Petitioner with First National Bank of Nevada at Reno, and credited \$13,902.00 to Petitioner's said promissory note of \$1,700,000.00.

(4) That on or about December 19, 1949, Petitioner sold 34,500 shares of said Serval common stock for the total sum of \$338,753.60 and Bank of America transmitted \$101,626.60 thereof for deposit to the account of Petitioner with First National Bank of Nevada at Reno, and credited the sum of \$237,127.00 on Petitioner's said \$1,700,000.00 note.

(5) All of said Serval stock was sold through Bank of America N.T. & S.A. upon the instruction and direction of Petitioner and the said sales, with the exception of the sale of 10,000 shares to Paul Jones, were made through Dean Witter & Co., brokers, of 45 Montgomery Street, San Francisco, California, with proceeds paid to Bank of America for the account of Petitioner for disbursal as aforesaid.

## VII.

(1) On September 8, 1949, Petitioner bor-

rowed from Grover D. Turnbow the principal sum of \$150,000.00, evidenced by Petitioner's promissory note in that sum, secured by a pledge of 22,315 shares of the capital stock of Electrolux Corporation. Annexed hereto, made a part hereof and marked Exhibit XIX is the original of said note and pledge, with attached certificate by the secretary of Petitioner. On September 19, 1949 Petitioner paid said Grover D. Turnbow on account of said note the principal sum of \$15,000.00, plus interest in the sum of \$199.90; on December 5, 1949, Petitioner paid said Grover D. Turnbow on account of the principal sum of said note the sum of \$10,000.00; and on March 31, 1950, Petitioner paid said Grover D. Turnbow the balance of the principal sum of said note, viz: the sum of \$65,000.00, plus interest thereon in the sum of \$1,462.73.

(2) On December 16, 1949, Grover D. Turnbow advanced for the account of Petitioner, at its request, the sum of \$50,000.00, and on December 19, 1949 Petitioner repaid said sum to said Grover D. Turnbow.

(3) On December 19, 1949, at the request of Petitioner, Grover D. Turnbow advanced to Petitioner the further sum of \$50,000.00, which said sum Petitioner repaid to said Grover D. Turnbow on December 20, 1949.

### VIII.

Petitioner, being indebted to Teleric, Incorporated of New York City, pursuant to a series of 15 promissory notes in the principal amount of \$61,733.33 each, aggregating \$926,000.00 dated No-

vember 18, 1947 and due July 1, 1952, made interest payments on said loan as follows:

- (1) January 10, 1949 in the sum of \$18,520.00;
- (2) July 6, 1949, in the sum of \$18,520.00.

Annexed hereto, made a part hereof and marked Exhibits XX (1) and (2) are paid checks of Petitioner evidencing the same.

#### IX.

(1) On January 3, 1950 Petitioner borrowed from Central Hanover Bank & Trust Company of New York, the principal sum of \$2,000,000.00, evidencing said loan by Petitioner's promissory note dated December 30, 1949, which said loan was secured by the hypothecation of 350,000 shares of the capital stock of Electrolux Corporation. 343,700 shares of said Electrolux stock were held by Bank of America N.T. & S.A. at San Francisco, which said stock was transferred by Bank of America to said Central Hanover Bank & Trust Company at the request of Petitioner. The proceeds of said \$2,000,000.00 loan were transferred by said Central Hanover Bank & Trust Company, through the Federal Reserve Bank for the credit of Bank of America N.T. & S.A., San Francisco, for the account of Petitioner. Bank of America N.T. & S.A. applied \$1,667.03 thereof on account of the unpaid interest on Petitioner's promissory note in the principal sum of \$1,700,000.00 dated September 8, 1949 and, upon the direction of Petitioner, forwarded to National City Bank of New York for Petitioner the sum of \$110,000.00, and transferred to Banco In-

ternationale of Mexico City, for the account of Petitioner, the sum of \$390,000.00, and credited to Petitioner's checking account with said Bank of America the balance of said \$2,000,000.00 fund, that is to say, the sum of \$274,987.97.

(2) Annexed hereto and hereby made a part hereof and marked Exhibits XXI (1), (2), (3), (4), (5), (6) and (7) are copies of letters and documents showing the consummation of the loan transaction between Petitioner and said Central Hanover Bank & Trust Company and the disbursement of funds received by said Bank of America N.T. & S.A. from said Central Hanover Bank & Trust Company.

(3) On March 15, 1950, Petitioner paid said Central Hanover Bank & Trust Company \$150,000.00 on account of the principal sum of said \$2,000,000.00 loan, and interest in the sum of \$16,444.44. Attached hereto, hereby made a part hereof and marked Exhibits XXII (1) and (2) is an original letter from said Central Hanover Bank & Trust Company dated March 15, 1950, to Petitioner, attached to which is the paid check of Petitioner in the sum of \$16,444.44 covering the check of Central Bank of Oakland in that amount, referred to in said letter.

## X.

(1) In December, 1948, Petitioner received from International Dairy Supply Company a written order for one lot of tin cans, to be shipped for its account to a point outside California. Prior thereto, International Dairy Supply Company had ordered

three lots of such cans directly from Western Can Co., as shown by Exhibit XXIII (1). Said order was then the subject of an order by Petitioner to Western Can Co., as shown by Exhibit XXIII (2). Prior to the transmission of such written order, a telephonic notification thereof was given to Western Can Co.

(2) In 1949 and 1950, Petitioner received from International Dairy Supply Company written orders for cans to be shipped for its account to points outside California.

(3) Annexed hereto and marked Exhibit XXIV is an original of one such order, which is intended as an exemplar of all the orders received, relating to the above-mentioned contract.

(4) Upon receipt of each such order, said Marion O. Palmer prepared an order for such cans and transmitted the same to Western Can Co., of San Francisco, California.

(5) Annexed hereto and marked Exhibit XXV is a full, true and correct copy of the form of such order which is intended as an exemplar of the form of all of said orders.

(6) After each carload of cans was shipped by Western Can Co., it invoiced Petitioner for each such carload of cans so shipped.

(7) Annexed hereto and made a part hereof and marked Exhibit XXVI is an original invoice received by Petitioner from Western Can Co. (each of which such invoices was subject to a 1% discount for cash), which such invoice is intended as



an exemplar of all of the invoices received by Petitioner from Western Can Co.

(8) Each such invoice received from Western Can Co. was paid by a check drawn on Petitioner's account with the First National Bank of Nevada at Reno, Nevada on the basis of the invoice price, less 1%.

(9) Annexed hereto and made a part hereof and marked Exhibit XXVI is one of Petitioner's cancelled checks in payment of a Western Can Co. invoice, which such check is intended as an exemplar of the checks of Petitioner, delivered by it to Western Can Co. in payment of such invoices.

(10) Marion O. Palmer prepared invoices for each such carload of cans and annexed hereto, made a part hereof and marked Exhibit XXVII is a full, true and correct copy of such an invoice, which is intended as an exemplar of all of the invoices which Petitioner sent International Dairy Supply Company.

(11) International Dairy Supply Company paid the price of each such carload of cans as invoiced to it by Petitioner, on the basis of the price invoiced by Petitioner, less a discount of 1% for cash.

(12) Annexed hereto and made a part hereof and marked Exhibit XXVIII is a schedule showing (a) the date and amount of payment (after a 1% cash discount) by Petitioner of each invoice which Petitioner received from Western Can Co., (b) the date and amount of payment (after a 1% cash discount) to Petitioner of each invoice by In-



ternational Dairy Supply Company, and (c) the profit of Petitioner on each such transaction. Items 28, 66 and 85 in Exhibit XXVIII are transactions wherein Petitioner ordered cans from Western Can Co. for Farmers Cooperative Creamery of McMinneville, Oregon, which such cans were invoiced by Western Can Co. to Petitioner and in turn by it to said Creamery, which paid for same as shown in said Exhibit. On August 9th, 1949, International Dairy Engineering Company ordered one carload of lithographed tin cans for shipment to Farmers Cooperative Creamery at McMinneville, Oregon in a transaction similar to the transaction evidenced by item 28, 66 and 85 in said Exhibit XXVIII. (Subsequent to 1950 International Dairy Supply Co. bought tin cans from Western Can Company and/or other Can Companies, in connection with aforesaid Armed Forces contract.)

#### XI.

(1) On July 12, 1948 Petitioner purchased from Kraft Foods Company of Chicago, Illinois, 1632-39 lbs. pails (40,248 pounds) of dry milk fat, for a total price of \$46,212.75.

(2) On August 18, 1948 Petitioner resold said 40,248 pounds of dry milk fat to Kraft Foods Company for a price of \$40,248.00.

(3) Attached hereto and made a part hereof and marked Exhibit XXIX (1), (2) and (3) are (a) letter of September 18, 1953 from Kraft Foods Company recounting the transaction, (b) copy of letter dated August 20, 1948 to S. L. Denning, and

(c) copy of Invoice No. 23074, dated July 12, 1948 from Kraft Foods Company to Petitioner.

## XII.

(1) In 1950 Petitioner, as an accommodation to Lecheria Nacional, S. A. of Mexico, D. F. purchased the items hereinafter specified from Creamery Package Co. and paid for the same and received reimbursement therefor from said Lecheria Nacional, S. A. as follows:

| Date     | Item                        | Amount     |
|----------|-----------------------------|------------|
| 5/31/50  | Creamery Package Washmaster | \$4,725.00 |
| 10/ 9/50 | Parts & supplies for        |            |
|          | Homogenizer .....           | 18.03      |
| 10/16/50 | Rim gaskets .....           | 23.56      |
| 11/24/50 | 3-phase Motor .....         | 133.65     |
|          | Total .....                 | \$4,900.24 |

(2) On December 5, 1950 Petitioner, as an accommodation to said Lecheria Nacional, S.A. purchased from Pfaudler Sales Co. certain parts for a homogenizer pressure valve and paid therefor the sum of \$34.50 and received reimbursement therefor from Lecheria Nacional, S.A.

(3) Annexed hereto and made a part hereof and marked Exhibit XXX (1), (2), (3), (4) and (5), are original invoices from Creamery Package Co. and from Pfaudler Sales Co. for the above mentioned items, attached to each of which such invoices is Petitioner's cancelled check for payment of same.

## XIII.

During the years 1948, 1949 and 1950, Nevada Agency and Trust Company, Petitioner's resident agent in Reno, Nevada, collected dividends on the shares of Servel, Inc. and Electrolux Corporation owned by Petitioner, depositing same to Petitioner's checking account in First National Bank of Nevada, at Reno, Nevada, as follows:

| Date                 | Amount               |
|----------------------|----------------------|
| Mar. 17, 1948 .....  | \$146,406.00         |
| June 21, 1948 .....  | 183,007.50           |
| Sept. 15, 1948 ..... | 183,007.50           |
| Oct. 6, 1948 .....   | 27,502.00            |
| Dec. 17, 1948 .....  | 27,502.00            |
| Dec. 22, 1948 .....  | 256,210.50           |
| Mar. 21, 1949 .....  | 146,406.00           |
| June 20, 1949 .....  | 146,406.00           |
| Sept. 6, 1949 .....  | 146,406.00           |
| Dec. 16, 1949 .....  | 146,406.00           |
| Dec. 27, 1949 .....  | 16,501.50            |
| Mar. 18, 1950 .....  | 146,406.00           |
| June 17, 1950 .....  | 146,406.00           |
| Sept. 18, 1950 ..... | 146,406.00           |
| Dec. 22, 1950 .....  | 2,406.00             |
| Total .....          | <hr/> \$1,867,385.00 |

## XIV.

During the years 1948, 1949 and 1950, Petitioner paid miscellaneous items of expense by its checks drawn on its account with the First National Bank of Nevada at Reno, Nevada, at the times, to the

persons and in the amounts set forth in Exhibit XXXI, hereunto annexed.

Dated: August, 1956.

/s/ JOHN POTTS BARNES, G.M.,  
Attorney for Respondent.

/s/ M. W. DOBRZENSKY,  
/s/ S. H. DOBRZENSKY,  
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1956.

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[Title of Tax Court and Cause.]

### SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated by and between the parties above named, through their respective attorneys, as follows:

There are attached hereto and made a part hereof as Exhibits A, B, and C, respectively, photostatic copies of the 1948, 1949, and 1950 Federal corporation income tax returns, Forms 1120, filed by petitioner. The said returns are referred to in paragraph 1 of the Stipulation of Facts herein.

/s/ S. H. DOBRZENSKY,  
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, G.M.,  
Chief Counsel, Internal Revenue Service, Counsel  
for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1956.

[Title of Tax Court and Cause.]

## SECOND SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto that the following facts should be deemed as true for purposes of this proceeding, reserving to each party the right to object to the materiality or relevance of any fact:

1. At least as early as January, 1947, Grover D. Turnbow was acting as attorney in fact for Axel Wenner-Gren, who was then living in Mexico City.

2. Axel Wenner-Gren was the owner of a substantial quantity of Electrolux and Servel stock.

3. On January 13, 1947 a loan of \$500,000 was made by the Bank of America N.T. & S.A. to Axel Wenner-Gren, secured by 55,000 shares of Servel stock and 50,000 shares of Electrolux stock.

4. On February 17, 1947 a new loan was made to Wenner-Gren by the bank, substituting the previous loan and increasing Wenner-Gren's loan obligations to \$800,000.

5. On May 9, 1947, the bank loaned Wenner-Gren an additional \$300,000.

6. On December 31, 1947 the loans of Wenner-Gren were paid from proceeds of a loan made by the bank to petitioner in the amount of \$1,100,000, secured by 258,700 shares of Electrolux stock and 55,000 shares of Servel stock. At that time the

bank was advised that petitioner was the incorporation of some of the interests of Wenner-Gren and the purpose of the loan was to pay off Wenner-Gren's obligations to the bank.

7. The loan hereinabove mentioned is the subject of the Stipulation of Facts, page 6.

8. That if Russell Smith, Executive Vice President of Bank of America N.T. & S.A., were called as a witness for Respondent, he would testify that the loan of May, 1948, referred to on page 7 of the Stipulation of Facts, in the sum of \$1,000,000.00, was made to petitioner for the purpose stated to the bank by Turnbow, of providing interim capital in connection with Wenner-Gren's obligations in the acquisition of the Mexican Telephone Companies.

/s/ S. H. DOBRZENSKY,  
/s/ M. W. DOBRZENSKY,  
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, G.M.,  
Chief Counsel, Internal Revenue Service, Counsel  
for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 31, 1956.



T. C. Memo. 1957-164

Tax Court of the United States

Docket No. 55212. Filed August 30, 1957.

CONTINENTAL TRADING, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM FINDINGS OF  
FACT AND OPINION

M. W. Dobrzensky, Esq., and S. H. Dobrzensky, Esq., for the petitioner.

Aaron S. Resnik, Esq., for the respondent.

Opper, Judge: Respondent determined the following deficiencies in income tax:

| Year       | Deficiency   |
|------------|--------------|
| 1948 ..... | \$208,300.59 |
| 1949 ..... | 151,559.71   |
| 1950 ..... | 114,468.53   |

The principal issue is whether petitioner qualified as a resident foreign corporation during the years involved by engaging in trade or business within the United States. If petitioner prevails on that issue, a subordinate issue to be considered is whether respondent erred in disallowing deductions for interest, expenses, and loss on sale of property as not connected with income from sources within the United States.

## Findings of Fact

Certain facts are stipulated and are hereby found.

Petitioner, a Panamanian corporation organized in May, 1947, maintained its principal office in Mexico City, Mexico. It filed its Federal income tax return for 1948 with the collector of internal revenue for the first district of California, and its 1949 and 1950 returns with the collector of internal revenue for the district of Nevada. Those returns stated that petitioner was a resident foreign corporation with "Investment" as its principal activity.

Petitioner qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of Reno, Nevada, company that acted as resident agent for petitioner and other foreign corporations. Petitioner represented that it maintained only one place of business in the United States.

Grover Turnbow, a United States citizen with offices in Oakland, California, served as petitioner's president. After March, 1948, at the suggestion of the California attorney who served as petitioner's vice president, Turnbow had petitioner's name added to the business names already appearing on his Oakland office door and on the building directory, which were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stock-

holder of Supply. Petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office.

Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over \$1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to petitioner's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States.

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East.

Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and the instability of foreign currencies.

Turnbow hoped that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to

secure funds, but without any voice or activity in the operations of the plants. Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose.

After petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, petitioner had assumed indebtednesses of Wenner-Gren as follows:

Bank of America, N. T. & S. A., \$1,100,000;  
Central Hanover Bank and Trust Company,  
New York, \$480,000;  
Teleric, Inc., \$926,000.

Petitioner liquidated the loan from Central Hanover Bank during 1948. The loan from Teleric, Inc. remained outstanding as of the end of 1950. It liquidated the loan from Bank of America in August 1948.

From 1948 through 1950, petitioner had no paid employees in the United States. Turnbow received \$1,500 per month during the last 6 months of 1950 denominated as salary for his services to petitioner. This represented part of an over-all settlement effectuated in June 1950 between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling \$105,000. The settlement covered, among

other items, Turnbow's services to Wenner-Gren from October 1946 through June 1950.

Petitioner maintained no books of account in the United States. Its only records consisted of bank statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N. T. & S. A. in San Francisco.

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

Petitioner reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows:

|      |       |              |
|------|-------|--------------|
| 1948 | ..... | \$817,791.39 |
| 1949 | ..... | 605,635.10   |
| 1950 | ..... | 446,863.19   |

Of the 1948 gross income, \$823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of \$5,844.11 resulting from sales of property other than capital assets. Of the 1949 gross income, \$602,125.20 represented dividends, and \$3,509.90 "Other Income in the United States." Of the 1950 gross income, \$441,624 represented dividends from the Electrolux Corporation, and \$5,239.19 additional income "From Sales."



During 1948, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May it borrowed \$1,000,000 from the Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed \$1,850,000 from the Bank of America, of which it used \$1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which petitioner had assumed. On that same date petitioner drew checks in excess of the balance of \$750,000 to make payments of principal and interest on other outstanding indebtedness.

During 1949, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September it borrowed \$1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank.

During 1950, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed \$2,000,000 from the Central



Hanover Bank. It used the bulk of this loan to repay the \$1,700,000 loan from the Bank of America. It transferred approximately \$400,000 to its account in Mexico City, \$110,000 for the account of a Swedish bank, and approximately \$275,000 to its account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts. (d) Petitioner repaid the \$2,000,000 loan. In its negotiations with the Central Hanover Bank, petitioner represented itself as a Panamanian corporation, doing business in foreign countries.

The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use.

In July 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently engaged. It purchased a carload of dry milk fat from Kraft Foods Company for \$46,212.75. Through Association, a company in which Turnbow was interested, it resold the fat 1 month later to Kraft for \$40,248. Association requested that Kraft made the check payable to petitioner. Petitioner reported the loss in its 1948 tax return.

As an accommodation to a Mexican corporation petitioner purchased, in 1950, equipment for that corporation for which it was reimbursed without profit.

In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income

amounted to \$120.64; in 1949, \$3,509.90; in 1950, \$5,239.19.

In connection with its contract for supplying recombined milk products to troops in the Far East, Supply found it necessary, commencing in 1948, to obtain tin cans. The contract set forth specifications for the necessary cans to be bought in the United States. In 1948, Supply procured the cans from Western Can Company, hereafter referred to as Western. An employee in Supply's procurement department ordered by telephone the necessary number of cans and followed up with a written purchase order. Supply received shipments for which it paid by check.

In December 1948, petitioner undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed petitioner at the same price which Supply had paid Western on an earlier order. That order, in petitioner's name, was first telephoned to Western by either Supply's procurement department or Turnbow's secretary on December 8, 1948. The Western salesman who received the order filled out an order form in the name of Supply, but petitioner's name was added later.

On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans addressed to petitioner. Supply had used the same form in preparing its orders theretofore forwarded directly to Western. Peti-

tioner then forwarded to Western a written confirmatory order in its name. Petitioner's check dated December 16, 1948 extinguished the obligation to Western for the cans. Supply paid an invoice on petitioner's letterhead for the cans at a 5 per cent increase in price within 10 days of the invoice date.

In 1949, petitioner utilized the same recording and routing of orders for cans needed by Supply on 37 occasions. Petitioner derived the proceeds reported as income on its 1949 returns because it billed Supply at 5 per cent more than it was billed by Western. In 1950, petitioner utilized the same recording and routing on approximately 48 occasions and derived the reported profit from sales transactions from this operation.

There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply. In every instance in which Supply acquired cans in this way, it paid petitioner within 10 days of petitioner's payment to Western.

After 1950, Supply recommenced ordering and purchasing of cans directly from Western.

During 1948, 1949 and 1950, petitioner was not engaged in trade or business within the United States.

#### Opinion

Business has been defined as "[t]hat which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." *Flint v. Stone*

Tracy Co., 220 U.S. 107, 171. "The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation." *Snell v. Commissioner*, (C.A. 5) 97 F. 2d 891, 892, affirming B.T.A. Memorandum Opinion. "\* \* \* it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word \* \* \*." *Deering v. Blair*, (C.A., D.C.) 23 F. 2d 975, 976, affirming 5 B.T.A. 1055. Transactions which are not entered into for profit and which do not and in all probability cannot result in a profit, particularly where such transactions are of an isolated and noncontinuous nature, will not dictate the conclusion that one is engaged in business. And that, notwithstanding petitioner's categorical statement to the contrary in its brief, we view as the only issue.

Petitioner claims the tax status of a resident foreign corporation in order to receive certain tax benefits. For this it must have been "engaged in business" in the United States.<sup>1</sup> The desired deductions and credits Congress could extend or withhold. *New Colonial Co. v. Helvering*, 292 U.S. 435. Our problem is to determine congressional intent with

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<sup>1</sup> Internal Revenue Code of 1939.

"Sec. 231. Tax on Foreign Corporations.

"(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 13 and section 15."

respect to the relevant statutory provision as applied to the demonstrated facts.

As to the legislative frame of mind there seems little room for doubt. The enactment of the 1942 amendment was accompanied by an unequivocal statement that a foreign corporation merely servicing its investments in this country was not the type of taxpayer to which the section was intended to refer.<sup>2</sup>

The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business. See *Linen Thread Co., Ltd.*, 14 T.C. 725. Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit.<sup>3</sup>

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<sup>2</sup> "A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations \* \* \* to attempt to establish that they have an 'office or place of business' within the United States and hence secure the very different tax treatment accorded taxpayers \* \* \* Since such corporations \* \* \* engage in no other economic activities in the United States, they can not be said to be engaged in trade or business within the United States." H. Rept. No. 2333, 77th Cong., 1st Sess., 1942-2 C.B. 372, 449.

<sup>3</sup> Petitioner's so-called "right" to conduct itself as it chooses is not now in controversy. The question is what are the effects of such conduct upon petitioner's tax liability.



In this case we think their character was such that they cannot be regarded as business transactions within the quoted definition because of their obvious lack of business purpose. *Thacher v. Lowe*, (S.D., N. Y.) 288 F. 994; *Deering v. Blair*, *supra*.

Petitioner relies on several cases for the proposition that the question is not what was petitioner's business, but whether what it did was in fact what it appeared to be in form. E.g., *W. P. Hobby*, 2 T.C. 980; *Clara M. Tully Trust*, 1 T.C. 611; *John Junker Spencer*, 19 T.C. 727. But these are authorities in an area which we regard as foreign to the present issue. There the question of purpose was significant in order to determine whether or not to give effect to the transactions in question, not in order to determine whether petitioner was, in fact, *Jan Casimir Lewenhaupt*, 20 T.C. 151, affirmed *per curiam* (C.A. 9) 221 F. 2d 227, "engaged in business." See *Marian Bourne Elbert*, 45 B.T.A. 685.

There are at least two factual reasons for answering that question here in the negative. The first is the element of purpose, in view of the difficulty of assuming that one would be engaged in business who had no "business purpose" but whose conduct, as apparently admitted by petitioner, was dictated not by a business objective but purely by a desire to save taxes. *Gregory v. Helvering*, 293 U.S. 465; *Linen Thread Co., Ltd.*, *supra*. In this view we may regard the transactions as "substantive" in the sense that the operations described were actually performed, just as they were so regarded in the *Gregory* case, without concluding that they consti-



tuted the conduct of a business, that they rendered the petitioner "busy," or that they were engaged in for a livelihood or profit.

Second, for a taxpayer to be engaged in business, there must be a fair degree of activity, scope and continuity in the transactions undertaken. See *Ehrman v. Commissioner*, (C.A. 9) 120 F. 2d 607, affirming 41 B.T.A. 652, certiorari denied 314 U.S. 668; *Snell v. Commissioner*, supra. The record as a whole and petitioner's summary of the transactions to which we have already referred demonstrate conclusively that there was neither consistency nor frequency in those few isolated activities which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue. And it is not without significance that petitioner itself on its tax return described its activity as "Investment."

Upon all the evidence, we conclude not only that petitioner has failed to carry its burden of showing that it was engaged in business in the United States, but that, in fact, the record affirmatively shows the opposite to be true.

Decision will be entered for the respondent.

Served and Entered Sept. 3, 1957.

The Tax Court of the United States  
Washington

Docket No. 55212

CONTINENTAL TRADING INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed August 30, 1957, it is

Ordered and Decided: That there are deficiencies in income tax as follows:

| Year       | Deficiency   |
|------------|--------------|
| 1948 ..... | \$208,300.59 |
| 1949 ..... | 151,559.71   |
| 1950 ..... | 114,468.53   |

Entered September 4, 1957.

[Seal] /s/ CLARENCE V. OPPER,  
Judge.

Served and Entered September 6, 1957.

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[Title of Tax Court and Cause.]

MOTION TO VACATE DECISION

The Petitioner, above named, by its counsel, Messrs. M. W. Dobrzensky and S. H. Dobrzensky, hereby moves for an Order of this Court vacating and setting aside this Court's Decision (ordering and deciding that there are deficiencies in income tax as follows:

| Year       | Deficiency   |
|------------|--------------|
| 1948 ..... | \$208,300.59 |
| 1949 ..... | 151,559.71   |
| 1950 ..... | 114,468.53)  |

entered on September 4, 1957, for the reason that said Decision is based upon the Court's Memorandum Findings of Fact and Opinion, dated August 30, 1957, which is not based upon the evidence and which is erroneous in law.

There is being filed contemporaneously herewith a separate Motion for Reconsideration of said Decision, in connection with which this separate Motion to Vacate said Decision is made. Reference is hereby made to said Motion for Reconsideration for a statement of the particulars of said errors respecting the evidence and law.

If, in the discretion of the Court, this Motion is placed upon the Motion Calendar for argument, then it is requested that the same be set on or after October 23, 1957, at the convenience of the Court, for the reason that said counsel have a matter on the trial calendar of the Division to sit in San Francisco, California, for call on September 30, 1957.

Dated at Oakland, California, September 23, 1957.

/s/ M. W. DOBRZENSKY,  
/s/ S. H. DOBRZENSKY,  
Attorneys for Petitioner.

Served and Entered Oct. 1, 1957.

Stamped: Denied. Oct. 1, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Sept. 24, 1957.

[Title of Tax Court and Cause.]

### MOTION FOR RECONSIDERATION

Comes Now the above named Petitioner by its counsel, Messrs. M. W. and S. H. Dobrzensky, and moves the Court for reconsideration and vacation of the Court's Memorandum Findings of Fact and Opinion herein filed August 30, 1957, a copy of which was received by Petitioner's counsel on September 10, 1957.

Said motion is made on each of the following grounds: that

- I. The Decision Is Erroneous In Law;
- II. The Decision Is Not Based Upon and Is Contrary to the Evidence.

In support of this motion, Petitioner alleges and shows:

#### I.

##### The Decision Is Erroneous In Law

A. The Court has erroneously stated the Legislative purpose in the enactment of the 1942 amendment to § 231(b) of 1939 IRC.

1. The Court's Opinion misstates and utterly misconstrues what it calls the "Legislative Frame of Mind" in the 1942 amendment of 1939 IRC § 231 (b). It says that the enactment

"was accompanied by an unequivocal statement that a foreign corporation Merely Servicing Its

Investments In This Country\* was not the type of taxpayer to which the section was intended to refer.”

There Is No Such Statement In The Legislative History. The Opinion then cites and quotes from the House Report in 1942-2 C. B. 372, 449.

2. One has but to look at this reference to see that the House Committee Report contained no such statement and that the Court failed to recognize what was the expressly declared purpose of the amendment.

3. The House Report first points to the then existing law under which foreign corporations were divided into two classes:

(a) those not Engaged In Trade or Business within the United States and Not Having an Office or Place of Business Therein,

and

(b) those Engaged In Trade or Business within the United States or Having an Office or Place of Business Therein.

Particular attention is directed to the Alternative statement in (b), supra, and to the fact that, Prior to the amendment, a foreign corporation Merely by Having An Office or Place of Business In the United States could qualify as a Resident foreign corporation and thus receive More Favorable Tax Treatment. The House Report then continues (1942-2 C. B. p. 450):

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\* All emphasis herein is by Petitioner.

“\* \* \* Since such corporations \* \* \* Engage In No Other Economic Activities In the United States, they cannot be said to be engaged in trade or business within the United States.”

4. Then the Report continues with this expression of its views which show the True Purpose of the amendment (p. 451):

“It Appears to Your Committee to be in the interest of good administration to Establish But One Test in ascertaining the classification of foreign entities, namely, Whether or Not It Is Engaged in Trade or Business Within the United States \* \* \*”

Thereupon, §231(b) was amended to read as follows:

“(b) Resident Corporations. A foreign corporation engaged in trade or business within the United States shall be taxable as provided in §13 and §15.”

5. Thus, After the amendment, a foreign corporation having large dividend income from U. S. stocks could Not qualify as a Resident foreign corporation Merely by maintaining an office or place of business here. It will be recalled that the House Committee Report (1942-2 C. B. 412), referring to the law Before the 1942 amendment, said:

“\* \* \* In many cases the advantages are such that it is profitable to Maintain an Office in the United States, or a Semblance of One, with No Purpose of transacting any business in this country. §143 of the bill, therefore, Amends



several provisions of existing law To Make Engaging in Trade or Business here the Sole Criterion.”

6. In addition to the foregoing, the Senate Report (1942-2 C. B. 546) reiterates the Purpose to adopt a single test for determining whether or not a foreign corporation is Resident:

“Your Committee have agreed to the House provision Requiring a Nonresident Alien or a Foreign Corporation To Be Engaged in Trade or Business Within the United States in Order To Be Taxable Like American Citizens or Domestic Corporations with respect to the income derived from sources within the United States. Under the present law, this privilege is extended to a nonresident alien individual or a foreign corporation Which Has an Office or Place of Business in the United States, Even Though It May Not Be Engaged in Business Therein. The provision in the House Bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue even though such corporation is not engaged in trade or business within the United States.”

7. The purpose of the 1942 amendment is clear and that purpose was Not as stated in the Tax Court's opinion. Its purpose was to Require Some-

thing More than maintaining an office to qualify as a Resident foreign corporation.

B. The Court's Opinion Overlooks an Earlier Decision Holding That the Enactment by Congress of §231(b) Was an Invitation to Foreign Corporations To Engage in Trade or Business in the United States and Thus Qualify as a "Resident" Foreign Corporation Entitled to More Favorable Tax Treatment Than a "Non-Resident" Foreign Corporation.

1. One needs only to look at §231(a) and (b) to observe that a Resident foreign corporation is taxed On a More Favorable Basis than a Non-resident foreign corporation.

2. If it be held, as the Court's Opinion holds, that a foreign corporation which Deliberately and Intentionally engages in trade or business in the United States to gain the tax advantage offered by §231(b) and Thus To Save Taxes, then The Will of Congress Is Defeated.

3. In its Opinion at page 12, referring to purpose, the Tax Court says that:

"\* \* \* In view of the difficulty of assuming that one would be engaged in business which had no 'business purpose' but whose conduct, as apparently admitted by Petitioner, was Dictated Not By a Business Objective But Purely By a Desire to Save Taxes \* \* \*"

4. The Opinion overlooks what was so pointedly said in Scottish American Investment Co., Ltd., 47

BTA 474, (aff. 132 Fed. 2d, 419 and 323 U. S. 119) where, at page 482 the Board of Tax Appeals said:

“Even if it be true that Tax Considerations prompted the opening of the offices in the United States, it would Be of No Particular Significance. Congress Extended the Invitation to foreign corporations to establish an office or place of business in this country. And So Long As the Office Is Not a Sham But Is a Place for the Transaction of Business, Petitioners Qualify under Section 231(b) \* \* \*”

At this time §231(b) remained unamended and the Mere Establishment of an Office Was Sufficient to gain for the foreign corporation the Preferential Tax Treatment accorded a Resident foreign corporation, which could establish itself as such Merely By Opening an Office.

5. Since such a proffered Invitation was accepted by Petitioner, there could be nothing wrong in a Deliberate and Intentional Acceptance of that invitation.

6. Furthermore, there is a long line of well-considered cases holding, where the question is whether or not a corporate entity should be recognized as a jural person, that it Is Immaterial That the Predominant Motive of the Incorporators Was To Minimize Taxes. *Sun Properties v. U. S.* (CA 5) 220 Fed. 2d 171; *Langdon L. Skarda*, 27 T. C. 15; *Freidlander Corp. v. Comm.* (CA 5) 216 Fed. 757; *Polak's Frutal Works, Inc.*, 21 T. C. 973; *Twinoaks Co. v. Comm.*, (CA 9) 183 Fed. 2d 385; *Riddlesbar-*

ger v. Comm., (CA 7) 200 Fed. 2d 165; John Junker Spencer, 19 T. C. 726.

7. It is beyond any possibility of doubt but that each and every transaction of Petitioner in the United States during the years in question was Actual and Real and Not Sham. The stipulated facts cannot be ignored.

8. As the Supreme Court held in *Moline Properties, Inc. v. Comm.*, 319 U. S. 436, whether or not a corporation should be disregarded as Unreal or a Sham seems to rest upon whether its creation Was Followed by Business Activity.

9. The Court's Opinion with reference to the matter of Tax Saving appears to be completely out of line with a long list of decisions.

10. *Herbert v. Riddell*, (DC Cal.) 103 Fed. Supp. 369, under the caption *The Taxpayer's Right To Reduce Tax Liability*, lists the principal authorities and says:

“The Supreme Court of the United States Ever Since the Question Came Before It in 1874 has insisted that a taxpayer may legally and honorably take means to minimize his taxes \* \* \*”

11. *Montgomery v. Thomas*, 146 Fed. 2d 76 at page 81 holds that Legal Transactions Cannot Be Upset Merely Because Parties Have Entered Into Them for the Purpose of Minimizing or Avoiding Taxes Which Might Otherwise Accrue.

12. The Tax Court in *John Junker Spencer*, 19 T. C. 727 at page 735 says:

“There is a well established principle in tax law that a Taxpayer May Legally and Honorably Take Any Steps Approved by the Law To Arrange His Affairs So As To Minimize His Tax Liability. *United States v. Isham*, 17 Wall. 496; *Gregory v. Helvering*, 293 U. S. 465. The Motive of Tax Avoidance for Entering Into a Particular Transaction Has Never Been Held a Basis for Liability Unless the Transaction Itself First Established Such Liability Without It. *Chisholm v. Commissioner*, 79 F. 2d 14. That is to say, the transaction must Actually Accomplish in Substance That Which It Purports To Do in Form. ‘It is axiomatic that the reach of the income tax law is not to be circumscribed by refinements of title \* \* \*’ See *Paul G. Greene*, 7 T. C. 142. Mere passage of title to income-producing property unattended by a complementary shift of entire economic benefits of ownership, both direct and indirect, will not suffice to relieve the transferor of liability for tax on the future income therefrom. *Helvering v. Clifford, Jr.*, 309 U. S. 331. The question ultimately to be Answered in Determining the Reality of a Transaction for tax purposes was succinctly stated by the Court of Appeals in the *Chisholm* case as:

“\* \* \* whether the transaction under scrutiny Is in Fact What It Appears To Be in Form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as whole is different from its appearance. True, it



is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, But the Purpose Which Counts Is One Which Defeats or Contradicts the Apparent Transaction, Not the Purpose To Escape Taxation Which the Apparent, But Not the Whole, Transaction Would Realize \* \* \*”

And, furthermore, the Tax Court in its same opinion, says very significantly at page 736:

“When a taxpayer seeks to achieve a desired business or tax result, He Has Freedom of Choice As to the Form in Which He Will Channel His Business. *Higgins v. Smith*, 308 U. S. 473. If the taxpayer Actually Carries On Business in the form so chosen, the Government may Not deprive him of the benefits which flow therefrom unless such form be found to be but a fiction or a sham. *Higgins v. Smith*, supra; *Rhode Island Hospital Trust Co.*, 7 T. C. 211. Thus, when a corporate form for carrying on business is Adopted and There Follows an Exercise of Corporate Powers and the Doing of Some Business in the Ordinary Sense Regardless of Quantum, the Corporate Identity Constitutes a Separate Taxable Entity and May Not Be Disregarded. *Moline Properties, Inc. v. Commissioner*, 319 U. S. 436 \* \* \*”

13. If the Court's Opinion would follow these clearly defined principles and apply them to the undisputed facts of the case at bar, it would necessarily have to arrive at the conclusion that the Peti-



tioner, in accepting the Congressional invitation to engage in trade or business within the United States and thus avail itself of preferential tax treatment, was acting with complete legal propriety and should be regarded as having been engaged in trade or business within the United States notwithstanding any desire to avail itself of the proffered tax advantages.

C. The Court's Opinion Violates the Rule Which Requires That It Look at the Composite Picture of Petitioner's Activities As an Integrated Whole and Not Analyze Each Activity Apart.

1. The Opinion has erroneously considered the activities of Petitioner Separately and has analyzed its activities Apart.

2. The proper approach to an evaluation of the activities of the Petitioner is as stated in *Helvering v. Scottish American Investment Co.* (CA 4) 139 Fed. 2d 419 (affirmed 323 U.S. 119) affirming the Board of Tax Appeals in 47 BTA 474. At page 422 the Court of Appeals said:

“We agree, too, with the Board that the proper approach to this problem is Not To Consider Each Activity and Power Separately and To Analyze It Apart so as to determine whether that one activity or power, considered alone, can be construed as casual or incidental. But the Composite Picture of These Activities and Powers Must Be Viewed As an Integrated Whole and a Solution Must Be Sought Accordingly. The strength of a rope is not

that of a single strand, or as Mr. Justice Holmes aptly said in *Edward v. Chile Copper Co.*, 270 U.S. 452, 455, 46 S. Ct. 345, 346, 70 L. Ed. 678: 'We cannot let the fagot be destroyed by taking of each item of conduct separately and breaking the stick. The Activities and Situation Must Be Judged As a Whole.'''

3. As presently will be shown, the Court's Errors of Law are closely interwoven with its Disregard of the Evidence and particularly of the Stipulated Facts.

4. Had the Court looked objectively at the Composite Picture of Petitioner's activities, it would have seen that the composite picture exhibited all necessary elements of Progression, Continuity and Sustained Activity.

(a) Exhibit XXVIII attached to the Stipulation lists Petitioner's 91 actual purchases of cans from Continental Can Company for a total cost of \$177,980.76 and the resale thereof for \$183,984.74 At a Profit. Item 1, of this list of 91 transactions is dated December 16, 1948; and Items 2 to 38 (37 transactions in all) were purchases which occurred during the months of January, April, May, June, July, August, September, October, November and December of 1949; Items 39 to 91 (representing 53 transactions in all) occurred during the months of January, February, March, April, May, June, July, August, September, October, November, and December, 1950.

(b) These Stipulated Facts clearly show Continuity and Substantiality in the 91 actual transactions which Produced a Profit to petitioner.

(c) Exhibit IV attached to the Stipulation is a further excellent index of the Continuity and Substantiality of Petitioner's commercial and financial activities in the United States. This is a list of 179 checks, totalling \$2,209,036.52, which Petitioner drew, Month by Month, against its account at First National Bank at Reno, Nevada. The 179 checks were drawn For Business, Commercial and Financial Purposes, Month by Month, starting March 18, 1948, to and including December 30, 1950. This Exhibit Speaks for Itself.

(d) Exhibit V attached to the Stipulation is another informative exhibit which further shows the Continuity and Substantiality of Petitioner's activities in the United States. This is a list of 19 checks, totalling \$2,065,987.97, which Petitioner drew against its account with Bank of America National Trust and Savings Association for Business, Commercial and Financial Purposes, during the period May 22, 1948 to and including September 15, 1950.

(e) In addition to these exhibits, which so clearly show the Continuity and Substantiality of Petitioner's activities in the United States, is the further Stipulated Fact that between May 21, 1948 and January 3, 1950 the Petitioner, through its President, here in the United States negotiated and Made Seven Loans Aggregating \$6,800,000 in Principal Amount.

(f) Also in December of 1949, Petitioner sold 55,000 shares of Servel stock for \$9.50 per share.

(g) On July 12, 1948 Petitioner purchased for \$46,212.75, and resold at a loss, one carload of anhydrous milk fat.

(h) During this period in the United States the Petitioner was Regularly Making Interest and Principal Payments on Its United States Bank Loans and Paying All of Its Incidental and Operating Expenses.

(i) And finally, it was the Uncontradicted Testimony of Mr. Turnbow, President of Petitioner, that Petitioner proposed to finance the establishment of recombined milk plants in foreign countries and during the years in question the principal activity in which he was engaged on behalf of Petitioner was an overall program having in mind the establishment of milk plants in foreign countries with Petitioner as the financial company who would underwrite these deals. The countries dealt with were Abyssinia, Peru, Venezuela, Panama, Israel, Italy, Turkey, India and Philippine Islands. He further testified that Most of These Negotiations for foreign built plants Were in Oakland, California and that the plans for establishing these plants were frustrated when Petitioner ascertained the inconvertibility of local currency of the countries in which it was proposed to establish the plants into United States dollars.

5. This failure of the Court to look at the Com-

posite picture of Petitioner's operations is a serious error of law.

D. The Opinion, in Dealing With Petitioner's Sales of Cans, Insisted on the Presence of a Business Purpose Independent of the Taking of a Gain, Contrary to the Rule Announced by the Court in an Earlier Case.

1. In its Opinion (p. 9) the Court says: "There Was No Business Purpose Connected With the Can Transactions."

2. The Opinion overlooks what the Court said in Hobby 2 T. C. 980:

"\* \* \* However, we would be most reluctant to impose a court-made requirement Of a Business Purpose Independent of Taking a Gain or Loss in determining the genuineness of sales in general, since it is common knowledge that vast numbers of sales have been made and are still being made for the purpose of taking gains and losses at times Which Provide the Optimum Tax Benefits."

3. Attention is called to Sun Properties v. U. S., (CA 5) 220 Fed. 2d 171, where, at page 174, it is said:

"Nor does the fact that this transaction May Not Have Any Business Purpose Other Than Saving Taxes, rationally imply that it was not a sale. No cases require that a Sale have any business purpose beyond that of realizing a capital gain. See Hobby, 2 T.C. 980."



4. In light of the foregoing, the Court clearly erred in determining that a business purpose was required in connection with the 91 undeniably actual and substantial can transactions which did yield a profit.

5. Furthermore, the Court erred, as previously pointed out, in considering this activity Apart and not a part of the Composite picture of Petitioner's operations.

Failure of the Court To Follow the Law and to look at the Composite picture of Petitioner's activities during the years in question and to view them As a Whole and Not Separately And Apart is responsible for the Court's refusal, Contrary to the Stipulated Facts, to recognize

—the Continuity of Petitioner's activities

—the Quantum and Substantiality of its activities

—the Reality of its activities.

Failure of the Court To Follow the Law and to recognize that the enactment of §231(b) was an Invitation by the Congress to foreign corporations to do the very thing that Petitioner did, viz. to Engage in Trade or Business in the United States and thus Effect a Proffered Tax Saving by being taxed at the Lower Rates applicable to Resident foreign corporations, as compared to the higher rates applicable to Non-Resident foreign corporations, lead the Court to the erroneous disregard of Petitioner's many actual, lawful, substantial and



continuous business, financial and commercial activities in the United States.

Failure of the Court To Follow the Law is responsible for its erroneous assertion that the Business (which it was Stipulated that Petitioner Did actually transact) required an additional "Business Purpose" when the law is clear that the realization of whatever gain or loss flows from the transaction is all the purpose that is required.

## II.

### The Decision Is Not Based Upon and Is Contrary to the Evidence

In Addition to its failure to view the Composite picture of Petitioner's activities, as pointed out in the first part of this Motion, the Court's Opinion overlooks or ignores substantial items of Petitioner's activities.

A. The Court's Opinion Has Erroneously Overlooked or Ignored Substantial Items of Real, Substantial, Continuous Business Activities of Petitioner and Has Failed to Evaluate Them As a Part of the Composite Picture.

1. In its Opinion, at page 4 thereof, the second sentence of the first paragraph declares:

"Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose."

Petitioner's President, Mr. Grover D. Turnbow, gave clear and uncontradicted testimony that he, as Petitioner's President, devoted considerable time during the three years in question in an effort to establish projects for the construction and operation of recombined milk plants. The evidence clearly shows that assets of Petitioner were used in this purpose.

2. A brief review of the testimony discloses the uncontradicted, substantial and convincing evidence disregarded by the Court. Thus, (quotations are from the Transcript at the page indicated):

(P. 117):

"Q. During the three years of 1948, 1949 and 1950 what was the principal activity in which you engaged as president of Continental; that is, during those years?

"A. Well, it was tied up with an overall program of which — of having in mind the establishment of plants in foreign countries, and Continental Trading being the financial company that was to underwrite these deals — and, as I say, deals — plants in these various countries.

"Q. Those were milk plants, is that correct?

"A. Yes, recombined milk plants.

"Q. What were some of the countries that you dealt with in those cases, if you recall?

"A. Oh, Abyssinia, Peru, Venezuela, Panama, Israel, Italy — considerable time spent in Italy — Turkey, India, Philippine Islands. Many, many countries we visited and worked with."

(P. 120)

“Q. Now, you mentioned a considerable number of countries with whom you discussed or dealt with with respect to possibilities of establishing plants. In those cases Did Negotiations Take Place in Your Office in Oakland, or Elsewhere?”

“A. Part of the time, part of the time; but Some of Them in Oakland, a Good Many of Them in Oakland. As a Matter of Fact, I Suppose in the United States Most of Them Were in Oakland, but many times we went to these foreign countries and negotiated right on the ground.

“Q. Now——

“A. At their request, as a rule. Generally you will find that some requests, a letter or some telephone—something, you will find requests for many of these places for negotiations.”

(P. 122)

“Q. I take it that none of these plans that you worked on during the years 1948, 1949 and 1950 materialized because of its inconvertibility?”

“A. That’s correct. Without that you can’t make it work at all.”

(P. 143)

“Q. Would it have not been possible for you, through your own enterprises, to have conducted these activities?”

“A. I didn’t have enough money. Outside of that it would have been all right.”

B. In Numerous Instances the Court Disregarded Stipulated Facts and Uncontradicted Testi-

mony and Drew Inferences Not Warranted by the Facts.

1. At page 3 of the Opinion, the Court found that "Prior To and during the years here involved, the program failed \* \* \*" due to inconvertibility of foreign currency and the instability thereof, whereas the testimony clearly shows that it was Following the efforts of the years 1948, 1949 and 1950 that the program failed as the problem of inconvertibility and instability was Then encountered in various of the numerous countries in which negotiations were being had by Petitioner.

2. At pages 3 and 4 of the Opinion, the Court finds that "Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, \* \* \*" and that "after petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired its stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans." The basis for these assertions appears to come from respondent's opening statement. The fact is that Wenner-Gren transferred valuable securities to Petitioner In Exchange for Its Stock and as a part of the Same Transaction and at that time Petitioner assumed the indebtedness for which the securities were then pledged. It will be observed that the Court has stated this proposition in a manner not warranted by the facts.

3. At pages 3 and 4, the Court states that Petitioner paid no rent for its Oakland office and that it had no paid employees in the United States, and

apparently draws some significance therefrom, whereas the fact is that while Petitioner paid no rent directly for the Oakland office and "had no paid employees" (outside of Nevada Agency and Trust in Reno), its attorneys and its President, Mr. Turnbow, Did Furnish Secretarial and Other Assistance and Offices and of His Own Services for which he received a settlement consisting of 5,000 shares of stock worth around \$55,000.00 and \$50,000.00 in cash.

4. At page 6, the Court finds that Wenner-Gren used the proceeds of loans in the acquisition of the telephone company stock in Mexico, A Matter That Does Not Appear Anywhere in the Evidence or Stipulation. On the same page, the Court states that the proceeds of these loans were used to pay indebtedness of Wenner-Gren, whereas in fact, they were used to pay debts of Petitioner, some of which were assumed in connection with the exchange of stock at the time of its creation.

5. At page 7, the Court states that the funds borrowed were in the main used by Wenner-Gren, whereas the fact is, they were used by Petitioner corporation, whether or not, as principal shareholder, Mr. Wenner-Gren may have been influential in the manner of their use.

6. At page 8, the Court refers to alleged "Orders" by telephone of cans, whereas the evidence shows, in the cross examination of the witness, Amand, the Western Can Company employee, Not that there were telephone orders, but that there was



Telephonic Notification in Advance of the Written Orders, which gave Western Can an opportunity to arrange its production to take care of an order when it came. The statement that these were "orders by telephone" is largely based upon statements made by counsel for the respondent.

7. At page 8, the Court uses the expression "in Petitioner's name" which is an equivocal statement in view of the fact that the Petitioner either acted through one of its authorized agents or a non-authorized person purported to act in the name of the corporation, and did not do so.

This motion is based upon all and singular the pleadings, stipulation and transcript in this case and upon the Court's aforesaid Memorandum Findings of Fact and Opinion.

Wherefore, Petitioner prays that the Court reconsider its said findings of fact and opinion and give consideration to the matters of law and fact aforesaid and find that Petitioner, during the years in question was engaged in trade and business in the United States and qualified as a resident foreign corporation.

This motion is accompanied by a separate motion to vacate and set aside the Decision, entered September 4, 1957, and based on said Memorandum Findings of Fact and Opinion.

If, in the discretion of the Court, this Motion is placed upon the Motion Calendar for argument, then it is requested that the same be set on or after



October 23, 1957, at the convenience of the Court, for the reason that said counsel have a matter on the trial calendar of the Division to sit in San Francisco, California, for call on September 30, 1957.

Dated at Oakland, California, September 23, 1957.

/s/ M. W. DOBRZENSKY,

/s/ S. H. DOBRZENSKY,

Attorneys for Petitioner.

Served and Entered Oct. 1, 1957.

Stamped: Denied. Oct. 1, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Sept. 24, 1957.

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[Title of Tax Court and Cause.]

**MOTION FOR LEAVE TO FILE MOTION TO  
VACATE DECISION, TO REOPEN THIS  
PROCEEDING, AND TO TAKE FURTHER  
TESTIMONY**

Comes Now the petitioner through its counsel, Fred R. Tansill, and respectfully moves this Court for leave to file motion to vacate decision, to reopen this proceeding and to take further testimony.

In support of this motion, it is averred that:

1. There is being filed together with this motion a motion to vacate decision, to reopen this proceeding and to take further testimony.

2. The decision in this proceeding was filed on September 4, 1957.

3. The undersigned has reason to believe that there is newly discovered evidence relating to the issue decided in this proceeding which, had such evidence been presented to the Court, would have resulted in a decision in favor of the petitioner on the issue in this proceeding. The evidence referred to relates to the circumstances surrounding the formation of the petitioner and the purposes for which it was formed together with certain activities of the petitioner which could constitute a sufficient degree of activity so as to qualify the petitioner as "engaged in a trade or business in the United States."

4. It is understood that this motion will be set for argument on a motion calendar by this Court. This matter has been discussed with counsel for the respondent and, respondent's counsel has indicated no objection to setting such an argument on Wednesday, November 27, 1957.

Wherefore, it is prayed that this motion be granted.

Respectfully,

/s/ FRED R. TANSILL,

Counsel for the Petitioner.

Of Counsel:

Leon, Weill & Mahony.

Served and Entered Dec. 5, 1957.

Stamped: Denied. Nov. 27, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Nov. 19, 1957.

[Title of Tax Court and Cause.]

MOTION TO VACATE DECISION, TO RE-  
OPEN THIS PROCEEDING, AND TO  
TAKE FURTHER TESTIMONY

Comes Now the petitioner through its counsel, Fred R. Tansill, and respectfully moves this Court to vacate the decision filed in this proceeding on September 4, 1957 and to reopen this proceeding for the purpose of taking further testimony.

In support of these motions, it is averred that:

1. The Memorandum Findings of Fact and Opinion of this Court in the above-entitled proceedings was filed on August 30, 1957.

2. The decision in this proceeding was filed on September 4, 1957.

3. The undersigned was retained as counsel by the petitioner on October 21, 1957 to prosecute an appeal from the decision of this Court to the United States Court of Appeals for the Ninth Circuit.

4. Such an appeal would have to be filed not later than December 4, 1957.

5. In the process of reviewing the files relating to this proceeding with reference to filing the appeal above-mentioned, the conclusion has been reached that not all of the available facts were presented with reference to the issue decided by the Court. In addition, the testimony of Axel L. Wenner-Gren, the principal party at interest, was neither sought nor presented to the Court. Wenner-

Gren is and was available to testify and could testify of his own knowledge to certain relevant facts in connection with the issue in the proceeding. See the attached affidavit of Axel L. Wenner-Gren.

6. It further appears to the undersigned that in some instances the facts presented were not presented in the most favorable light. In this connection see the affidavit of Birger Strid, attached.

7. It is believed that a more complete, accurate and informative presentation of relevant facts could be made if these motions were granted and the decision vacated and the proceeding set for the taking of further testimony.

Wherefore, it is requested that these motions be granted.

Respectfully,

/s/ FRED R. TANSILL,  
Counsel for Petitioner.

Of Counsel:

Leon, Weill & Mahony.

#### AFFIDAVIT

City of New York,  
County of New York,  
State of New York—ss.

I, Axel L. Wenner-Gren, being duly sworn, depose and say as follows:

I am a citizen of Sweden and currently a resident of Mexico City, D.F., Mexico;

I am also the person primarily interested in the decision of the Tax Court of the United States in Continental Trading, Inc., Docket No. 55212, in which decision was entered on September 4, 1957;

I was a Director and the original founder of that company;

Continental Trading, Inc. was formed by me in 1947 in furtherance of my plans for international distribution of dehydrated milk products in part under the auspices of UNICEF, an adjunct of the United Nations;

The function of Continental Trading, Inc. was dual in that it was to function as a financial reservoir of international milk operations and was in addition to serve as a purchasing and selling agent of dehydrated milk products in the United States and elsewhere throughout the world;

I have read the opinion of the Tax Court of the United States with reference to the above mentioned Continental Trading, Inc. case and I have the impression that an incomplete and in part inaccurate presentation of facts was given in that case;

I was not advised of the pendency or hearing held in the Tax Court of the United States in this connection nor was I invited to testify as a witness;

Had I been invited to testify as a witness and had I testified, I could have been able to present additional evidence bearing upon the issues presented to the Court.

In addition to my testimony, other possible wit-

nesses who have personal knowledge of the purposes and activities of Continental Trading, Inc. could be made available for the Court.

/s/ ALEX L. WENNER-GREN.

Subscribed and sworn to before me this 15th day of November, 1957.

/s/ BEATRICE S. ELKIN,

Notary Public, State of New York. No. 41-1100335.

Qualified in Queens County. Cert. filed with New York Co. Clerk. Commission expires March 30, 1959.

#### AFFIDAVIT

City of New York,  
County of New York,  
State of New York—ss.

I, Birger Strid, being duly sworn, depose and say as follows:

I am a citizen of Sweden and a resident of Sweden;

I have been connected with various enterprises owned, operated and conducted by Axel L. Wenner-Gren since 1940.

During the period of my association; namely, since 1940, my activities have been confined to the milk and milk products enterprises. Among other things, I am Chairman of the Board of Swedish Milk Products which is the largest dry milk enterprise in Sweden. This enterprise is owned by Axel L. Wenner-Gren.

Commencing in 1938, the company above men-



tioned inaugurated a program of milk dehydration and the production and exportation of such products. I have been intimately connected with that program since my joining the company and still am connected with that activity today.

After the end of World War II, the Swedish Milk Company embarked upon a program of European distribution of dehydrated milk products in connection with various governments in Europe and relief organizations. The Swedish Milk Company was a technical consultant and adviser to UNICEF, an adjunct of the United Nations, in connection with their European Milk Conservation Project, and supplier for their world wide distribution of dry milk products to deficit areas.

My activities in these connections have required that I become and remain intimately familiar with the international market for milk and dehydrated milk products.

Commencing in 1948 and continuing in an accentuated degree in 1949 and 1950, there was a tremendous oversupply and overproduction of milk and dehydrated milk products in the United States. As a result of United States Government programming, surplus milk and milk products were distributed more or less free of charge throughout the deficit areas of the world. The result was that it was not feasible to continue the milk dehydration program of Continental Trading, Inc. in the United States during the years mentioned. I have personal knowledge of the problems and operational methods envisaged for Continental Trading, Inc. through my

connection with Mr. Wenner-Gren and his other milk enterprises in Sweden and Europe.

/s/ B. STRID.

Subscribed and sworn to before me this 18th day of November, 1957.

/s/ BEATRICE S. ELKIN,

Notary Public, State of New York. No. 41-1100335.

Qualified in Queens County. Cert. filed with New York Co. Clerk. Commission expires March 30, 1959.

Served and Entered Dec. 5, 1957.

[Endorsed]: T.C.U.S. Lodged Nov. 19, 1957.

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[Title of Court of Appeals and Tax Court Docket No. 55212.]

### PETITION FOR REVIEW

To The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes Now the Petitioner on Review, Continental Trading, Inc., and hereby petitions the United States Court of Appeals for the Ninth Circuit to review the Decision filed by The Tax Court of the United States on September 4, 1957, ordering and determining that there are income tax deficiencies for the calendar years 1948, 1949 and 1950 in the respective amounts of \$208,300.59, \$151,559.71 and \$114,468.53.

This Petition for Review is filed pursuant to the provisions of Section 7482 and Section 7483 of the Internal Revenue Code of 1954.

The Petitioner on Review, Continental Trading, Inc., is a Panamanian corporation organized in May, 1947 and maintained its principal office in Mexico City, Mexico. It filed its United States Federal income tax return for the year 1948 with the Collector of Internal Revenue for the First District of California; it filed its United States Federal income tax returns for the years 1949 and 1950 with the Collector of Internal Revenue for the District of Nevada. All of the United States income tax returns above-mentioned were filed with Collectors of Internal Revenue whose offices are within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

#### Nature of the Controversy

The principal issue presented for adjudication is whether Petitioner on Review qualified as a resident foreign corporation during the years 1948, 1949 and 1950 by engaging in trade or business within the United States as defined in Section 231 (b) of the Internal Revenue Code of 1939. A subsidiary issue involves the right of Petitioner on Review to deduct certain interest, expenses and loss on sale of property which had been disallowed by the Commissioner as not connected with income from sources within the United States. This issue was not reached below, The Tax Court of the United States having held that Petitioner on Review was not engaged in a trade or business within the United States. In addition, there is a question

of whether this case should be remanded to The Tax Court of the United States for further proceedings before this Court passes upon the merits of the principal issue. Petitioner asserts that through mistake or inadvertence certain material and relevant evidence relating to petitioner's activities in the United States during the years involved was not presented to The Tax Court of the United States and that Court, prior to filing this Petition for Review, refused to reopen the case and receive this additional evidence.

/s/ FREDERICK R. TANSILL,  
Attorney for Petitioner on  
Review.

[Endorsed]: T.C.U.S. Filed Dec. 3, 1957.

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[Title of Court of Appeals and Tax Court Docket  
No. 55212.]

#### STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to-wit:

The Tax Court of the United States erred:

1. In failing to determine that petitioner was a resident foreign corporation engaged in trade or business in the United States during the taxable years;

2. In failing to determine that the scope and continuity of all of the United States activities of

petitioner in the taxable years were sufficient in the aggregate to constitute "engaged in trade or business" within the meaning of Section 231(b) of the Internal Revenue Code of 1939;

3. In failing to allow petitioner claimed deductions for interest, expenses, and loss on the sale of property which were connected with income derived from sources within the United States;

4. By abusing its discretion in denying a motion for leave to file motion to vacate decision, reopen proceedings and take further testimony on the basis of mistake, inadvertence or newly discovered evidence;

5. By failing to follow the standards for relief from judgment provided by Rule 60(b) of the Federal Rules of Civil Procedure;

6. In failing to relieve the petitioner of its judgment and reopen the case for the purpose of receiving further material and relevant testimony with respect to the petitioner's United States activities during the taxable years not heretofore presented to or considered by the Tax Court which, if received, reasonably could have been expected to result in a determination that petitioner was engaged in trade or business in the United States;

7. In basing its determination upon incomplete and, in part, inaccurate facts;

8. In sustaining the deficiencies as determined by the Commissioner of Internal Revenue;



9. In that its Opinion and Decision are both contrary to law.

/s/ FRED R. TANSILL,  
Counsel for Petitioner on  
Review.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed Feb. 21, 1958.

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[Title of Tax Court and Cause.]

### CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 32, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review", including Joint Exhibits I thru XVIII (1), (2), (3), XIX, XX (1), (2), XXI (1), (2), (3), (4), (5), (6), (7), XXII (1) (2), XXIII (1), (2), XXIV, XXV, XXVI, XXVII, XXVIII, XXIX (1), (2), (3), XXX (1), (2), (3), (4), (5) and XXXI, attached to the Stipulation of Facts, but excepting certain Exhibits separately certified, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand

and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of February, 1958.

[Seal]      /s/ HOWARD P. LOCKE,  
                                 Clerk, Tax Court of the United  
                                 States.

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The Tax Court of the United States

Docket 55212

CONTINENTAL TRADING, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

Customs Courtroom 421, 630 Sansome Street, San Francisco, California, August 30, 1956.

(Met, pursuant to call of the calendar.)

Before: Honorable Clarence V. Opper, Judge.

Appearances: Stacey H. Dobrzensky, Esq., and Milton W. Dobrzensky, Esq., 1516 First Western Bank Bldg., Oakland, California, appearing for the Petitioner. Aaron S. Resnik, Esq., (Honorable John Potts Barnes, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1]\*

\* Page numbers appearing at top of page of Reporter's Transcript of Record.

## Proceedings

The Court: We will have the call of the calendar.

The Clerk: Docket No. 55212, Continental Trading, Inc.

Mr. Resnik: Aaron S. Resnik for the respondent and ready for trial.

Mr. Stacey H. Dobrzensky: Stacey H. Dobrzensky and M. W. Dobrzensky and ready for trial as well, your Honor.

The Court: Marked ready.

I think that is all we have, isn't it, Mr. Clerk?

The Clerk: Yes, your Honor, except I would like to make the notation in the record that there has been filed with the Court this morning the amendment to the petition and docket No. 45932, Babetta Schmidt vs. Commissioner of Internal Revenue, and the respondent's answer to the amended petition.

That is all, your Honor.

The Court: Proceed, please.

Mr. Stacey H. Dobrzensky: If the Court please, I think the first order of business—I have in my hand an original and copy of a stipulation entered into between the parties. The original contains a series of exhibits; the copy does not. Each side has copies of the exhibits and, if I may, I would like to file those at this time.

The Court: The stipulation will be received. [3]

The Clerk: The stipulation in Docket No. 55212, Continental Trading Company vs. Commissioner is received.

Mr. Stacey H. Dobrzensky: If the Court, please, Counsel has handed me a second stipulation entitled "Supplemental Stipulation of Facts" whereby parties stipulate that the photostatic copies of the returns in question may be filed in lieu of the original, which I should like to file at this time as well.

The Court: The supplemental stipulation will be received.

Now, let's get the exhibit numbers straight. Is that the only one that has exhibits, the supplemental stipulation?

Mr. Stacey H. Dobrzensky: Each has exhibits, your Honor. The main stipulation has exhibits numbered 1 through 31 attached to it and referred to and incorporated in it, and I believe that the only exhibits on the supplemental stipulation are copies of three returns for the three years.

The Court: What are they, A, B, and C?

Mr. Resnik: That is correct.

The Court: So 31 and C are the highest numbers, is that correct?

The Clerk: That is correct.

Mr. Stacey H. Dobrzensky: That would be correct.

If the Court please, your Honor will recall in the [4] discussion in chambers that one witness who has been subpoenaed by the Government will not be able to attend until Friday morning, tomorrow morning, by his absence outside of the State, and in view of the fact he was served with subpoena, I would prefer that the record show there is no objection to his failure to be present this

For the calendar years 1948, 1949 and 1950, petitioner filed its income tax returns as a resident foreign corporation under Section 231(b) of the 1939 Internal Revenue Code, reporting income from sources within the United States as follows:

|            |              |
|------------|--------------|
| 1948 ..... | \$817,791.39 |
| 1949 ..... | 645,635.10   |
| 1950 ..... | 446,863.19   |

In these returns, petitioner took the credits and deductions which are allowed a resident foreign corporation under Section 231(b).

In his review of these tax returns, respondent made the following determination, as set forth in the 150 day letter, a copy of which is annexed to the petition on file herein: [7]

“Explanation of Adjustments.

“(a) and (b). Your returns were filed on the basis that you were a foreign corporation but engaged in trade or business in the United States during the years 1948, 1949 and 1950; and the tax liabilities shown on your returns were computed under the provisions of sections 13 and 14, Internal Revenue Code. On the basis of information submitted and after consideration of the contentions raised in the protest filed by you, it is held that you are a foreign corporation not engaged in trade or business within the United States and subject to income tax liability determined under the provisions of section 231, Internal Revenue Code.

“In accordance with section 231 there are ex-



cluded from your taxable income the miscellaneous gains derived from sales of property in 1949 and 1950 as reported on your returns. In accordance with section 232 there are disallowed all deductions for interest, expenses and loss on sale of property for years 1948, 1949 and 1950 as claimed on your returns on the ground that such deductions were not connected with income derived from sources within the United States."

The principal question with which we are concerned [8] is whether, during the three years in question, petitioner was engaged in trade or business within the United States, and thus was taxable as a resident foreign corporation, under Section 231(b).

Most of the facts in this case are stipulated and the stipulated facts themselves show that during these three years, petitioner was substantially and continuously engaged in trade or business within the United States and that the disallowed deductions were connected with income derived from sources within the U. S.

Petitioner established a legal domicile in the United States and qualified as a resident foreign corporation in the State of Nevada on March 13, 1948, where it maintained its principal office in the United States under the control of its resident agent in that state, during 1948, 1949 and 1950.

It also maintained a business office in Oakland, California under the direction of its president, who was not a stockholder in petitioner, but who was a citizen and resident of the United States.

It kept a record in the office of its business transactions within the United States. The president was assisted by petitioner's vice president, who was also a citizen of the United States, a resident of Oakland, California and not a shareholder of petitioner.

Petitioner's many and substantial business transactions in the United States in the years in question were [9] neither sham nor unreal, but all were actual and factual, as the evidence will show.

During all of the period here involved, petitioner carried on extensive negotiations with persons from or representing foreign countries in its effort to promote and exploit petitioner's business program for the establishment and financing of recombined milk and dairy products plants in Asia, Europe, South America and elsewhere. Petitioner was actively engaged in its efforts to establish and finance recombined milk and dairy products plants in order to carry out a world-wide nutrition program that would not only enhance petitioner's financial interest, but would also be a great help to strengthen the hands of the free world in the battle against communism by feeding large masses of hungry people in other lands—people whose hunger and hopelessness made them readily susceptible to the spread of communism.

Petitioner also desired, by the establishment of these milk plants, to reduce and possibly eliminate the growing surplus of dairy products which had been accumulating in the United States.

The number, continuity and substantiality of the

petitioner's business transactions in the United States during 1948, 1949 and 1950 (in addition to those relating to its efforts to establish and finance milk plants in foreign lands, just enumerated) are set forth in the stipulation and cannot [10] be questioned:

It negotiated and made four bank loans, three in San Francisco and one in New York, which totalled \$6,550,000.00 in principal amount;

These loans were secured by pledges of 55,000 shares of Servel, Inc. stock and from 278,700 to 350,000 shares of Electrolux Corporation stock;

Petitioner paid loan interest in 1948, 1949 and 1950 in the approximate sum of \$175,000.00;

All of said loans were paid;

Petitioner made three loans from an individual totaling \$250,000.00, and repaid these loans and the interest thereon;

The list of 176 bank checks which petitioner drew against its account with First National Bank of Nevada at Reno, Nevada, from March 18, 1948 to December 30, 1950, which list is attached to the stipulation, totalled \$2,209,036.52 and the items for which the checks were drawn show the nature of petitioner's business and the continuity of its operations;

The list of 16 bank checks which petitioner drew against its account with Bank of America N.T. & S.A. at San Francisco from May 22, 1948 to September 15, 1950, which list is attached to the stipulation, totalled \$1,925,806.55; [11]

Petitioner collected through its Reno, Nevada

office dividends on shares which it owned in United States corporations, totaling \$1,867,385.00;

Petitioner bought a carload of anhydrous milk fat for \$46,212.75 and resold it at a loss when the market price of fat dropped;

Petitioner purchased 90 carloads of tin cans from Western Can Co. for \$177,980.36 and sold same to International Dairy Supply Company and others at a profit for a total sum of \$183,984.74.

Petitioner sold 55,000 shares of Serval, Inc. stock in five transactions, for a total price of \$538,081.98.

All of these commercial transactions actually occurred. They were neither sham nor unreal.

In evaluating these activities of petitioner to determine whether they constituted its engaging in trade or business within the United States, the rule, well established in the Tax Court, the Circuit Courts and the Supreme Court is that respondent cannot take one by one, each activity carried on by petitioner in the United States and argue that each activity is not in and of itself the transaction of business, but the composite picture of these activities must be viewed as an integrated whole and a determination made accordingly.

Although respondent has never denied that these many and substantial business transactions of petitioner actually [12] did occur, he has chosen to disregard them for the reason, expressed by the Internal Revenue Agent who reviewed this case before the Appellate Staff, that petitioner's admitted business transactions "were not fraught with sufficient business purpose."

In this respect, the respondent was undoubtedly motivated by the fact that when petitioner accepted the invitation extended by the congress to foreign corporations (in enacting Section 231(b) of the Internal Revenue Code), to engage in trade or business within the United States, petitioner thereby gained the tax advantage of being taxed as a resident foreign corporation.

However, respondent appears to have forgotten that this is the same position that he was unsuccessful in maintaining in the Tax Court in such cases as *Tully*, 1 T.C. 611, *Hobby*, 2 T.C. 980, and *McKee*, 35 B.T.A. 235, where he unsuccessfully contended that the actual transactions there involved could be disregarded because of his claim that they "had no business purpose" because the transactions "made a saving in income taxes," etc.

Notwithstanding his acquiescence in these adverse decisions and notwithstanding the similar decisions, adverse to him, the Circuit Courts and the Supreme Court, respondent is here urging again that petitioner's business transactions, for similar asserted reasons, are sham and unreal and may be disregarded by him. [13]

There can be no question with respect to the propriety of respondent carefully scrutinizing transactions where he believes that the only motive therefor is tax avoidance. But as shown in *Sun Properties v. U. S.*, 220 Fed. 2d 171, 174, the error into which he has fallen is that he has elevated this rule of careful scrutiny into a purported rule



wholly devoid of legal support, which would change the substantive effect of the actual transactions.

This is exactly what the respondent has done in the present case, ignoring the fact that legitimate business transactions cannot be upset even if motivated by purposes of legitimate tax minimization. Tax minimization is not an interdicted purpose and the primary purpose to realize gain is a legitimate business purpose, even though it may have a collateral favorable tax effect.

The fact that petitioner herein makes statements concerning tax motives should not be taken by this Court to mean petitioner was motivated by, let alone solely by, tax motives—the facts negative any such contention.

As the Tax Court said in *Hobby*, 2 T.C. 980, 985: “The question is not one of purpose, but whether the transactions were in fact what they appear to be in form.”

That the continuous business activity and numerous business transactions of petitioner actually and really [14] occurred, without pretense or unreality of any kind, are, unquestionably, established by the stipulation we are about to offer. The testimony that petitioner will offer will only serve to emphasize and underscore the substance underlying the form of a three year course of very real trade and business, and to dramatize the unreal, illusory character of respondent's assertion to the effect that “what is real is not real because it is not real.”

The Court: Now, do I understand correctly that even though you have what purports to be

three assignments of error that there is really only one?

Mr. Stacey H. Dobrzensky: I think that it could be safely said that the principal question in this case is whether or not the petitioner was engaged in trade or business.

The Court: That is what I am getting at. Is there any other question?

Mr. Stacey H. Dobrzensky: All of these three stipulations, your Honor, are intertwined. They are basically all—stand upon the question, I should say, of whether or not the petitioner was a foreign corporation engaged in trade or business. It is a question of dividends receiving credit, and there is a question of certain deductions, all of which fall within the same sections and stand upon the same basic propositions.

The Court: That is what I am trying to find out now. [15] Assuming that you win on the doing business matter, would there be anything more to consider?

Mr. Resnik: Clearly there would be, your Honor, if by that your Honor means that a victory for the petitioner on that issue would mean no deficiency for each of the years in question.

The Court: I don't care about that. I want to know whether it is a contested deficiency.

Mr. Resnik: Yes. There may well be; they are conceding something by their assertion.

The Court: I am trying very hard to find out that now.

Mr. Stacey H. Dobrzensky: Your Honor, we are

contending that these deductions were erroneously disallowed.

The Court: For any other reason than that you were doing business in the United States. Now, those deductions would be disallowed automatically. If you weren't doing business, unless you contend that notwithstanding you weren't doing business, there is still connected with the receipt of income from sources within the United States. Now, do you make that contention?

Mr. Stacey H. Dobrzensky: Yes.

Mr. Milton W. Dobrzensky: Yes, of course.

The Court: In other words, that is a subordinate contention to your main one? [16]

Mr. Stacey H. Dobrzensky: They were connected. It was income derived from sources within the United States.

The Court: Well, income that is taxable under 231 if you were a foreign corporation not doing business here?

Mr. Stacey H. Dobrzensky: That is correct.

Mr. Milton W. Dobrzensky: Yes, I am sure it is.

Mr. Stacey H. Dobrzensky: That is our position, your Honor.

The Court: That is what I am trying to find out so that even though you lost on the main question, whether you were doing business here, you would still make a subordinate contention that you were entitled to the deductions, or some of them?

Mr. Stacey H. Dobrzensky: That is correct, your Honor.

The Court: Now, is there anything else? Is there any other besides those two?

Mr. Stacey H. Dobrzensky: I believe those are the issues.

The Court: For example, you said something about a dividend paid credit.

Mr. Resnik: Dividend received.

The Court: Dividends received credit. That would stand or fall on the doing business matter, wouldn't it?

Mr. Stacey H. Dobrzensky: That is correct, that is [17] correct.

The Court: Thank you.

Opening Statement On Behalf of the Respondent  
By Mr. Resnik:

Mr. Resnik: May it please the Court, I didn't quite understand the position now taken by the petitioner with reference to the subordinate issues. In order that there be no confusion as to the position we take and as to the state of pleadings in which they now appear, I should like to say that there is one basic issue. That is whether this petitioner was engaged in trade and business during the years here in question, or during any of the years. On that basic question, of course, the Court might well find it was not engaged in business in all of the years. It might find it was engaged in business in all of the years, or it might find it was engaged in business in some of the years and not in others. That is a possibility under the case.

It would appear to me that if the respondent

were successful on that issue, then the deficiencies as asserted would have to stand.

The Court: Now, may I interrupt you. That is the position that Mr. Dobrzensky refuses to concur in.

Mr. Resnik: I realize that now for the first time.

I would say further that even if the petitioner were successful on the same issue, then a subordinate issue [18] still comes into play under Section 232 with reference to the appropriateness of the allowance of the deductions or any part thereof.

The Court: I don't want to interrupt you, but I would like to have you either now or later come back to that.

Mr. Resnik: I can take it up at this point. I think it might be in the interest of clarity.

Section 232 which deals with the question of allowance of deductions relates to the allowance of deductions with reference to resident foreign corporations, as well as non-resident foreign corporations, and by the use of those terms we mean corporations engaged in business and not engaged in business. Even if it were to be found that a corporation was a resident foreign corporation, all of the deductions claimed on its return would not of necessity have to be allowed.

The Court: Isn't that the same issue the other way around that we have already talked about? In other words, that issue would be the case both ways, as I understand it, whether the petitioner won on the main issue or whether the respondent won. Isn't that all you are saying?



Mr. Resnik: I am not certain that it would be in the case if the respondent won the main issue. I am certain that it is in the case of the petitioner.

The Court: It is in the case because the petitioner [19] says it is in the case. That doesn't mean he is making that contention.

Mr. Resnik: In so far as he is making that contention it is before the Court. In that connection I would like to point out to the Court that, notwithstanding that there is an assignment of error in the petition, that somewhat obliquely raises the point. There is not a single recitation of fact in the petition which raises the issue either way. Therefore, I would say on the basis of the pleadings as they now appear the alternative issue, irrespective of how the first issue is decided, must be decided in favor of the respondent.

The Court: Well, I am not going to go through this entire recitation of the facts in the petition, but since you heard that contention made, is there anything you want to do about it?

Mr. Milton W. Dobrzensky: There is nothing we want to do about it at this point. We were seeking to review the determination that was made, and we have in the stipulation: and with the other facts to be adduced we will produce in the record everything that bears upon us that would enable the Court to make whatever determination is to be made.

The Court: Mr. Resnik is saying in effect that since the way your petition is now drawn, the state

of the pleadings is such that you can't raise that issue.

Mr. Milton W. Dobrzensky: Under those circumstances, [20] this being our first notion of that idea, we would ask leave to amend our statement to set forth the pertinent facts.

The Court: Do you have any objection to that, Mr. Resnik?

Mr. Resnik: I don't know what they would be, but I certainly would have no objection. I think that is a matter of course, that they can amend their petition.

The Court: Can't we leave it like this, since the facts may be possibly all spelled out in the stipulation, that this would amount to notice that the petitioner will propose to amend his pleadings and form the proof as it goes in the case and simply stating it now so you will be advised he is making that contention? In other words, the assignment of error is not enough to include it, as I read it, and the only question is about the allegations of the facts.

Mr. Resnik: Yes.

The Court: And since whatever the facts that he relies on will be in the record, it seems to me the simplest thing, you having been put on notice now so that you won't be surprised, the simplest thing would be for him to move to amend the pleadings on the proof. Of course, if there is nothing in the proof then he is going to lose anyhow.

Mr. Resnik: Yes. By the same token, I would then, at this point, ask leave for the respondent to

have the opportunity to amend his pleadings to conform to proof if that [21] becomes apparent in the case.

The Court: I take it there would be no objection to that, excepting that it seems to me that you should state now and notify the petitioner if you think that is going to raise any issue that isn't in evidence from the pleadings.

Mr. Resnik: I should be happy to do that now. There is a possibility that under the 'first issue of "engaged in trade or business", if the respondent were successful on that issue—and we hope that he is—that under a certain state of facts small increases in deficiency might result based upon the fact as was read to your Honor. There was removed from reported income small amounts of gain from the sale of property. If that income arose not from the sale of property but from a type of activity more akin to a commission or rendition of a service, then clearly it would have been includable in income. It was reported on the income as a property transaction and was removed. The amount involved is frightfully small as compared——

The Court: What you are saying is you might move to ask for an increase in deficiency?

Mr. Resnik: Yes.

Mr. Stacey H. Dobrzensky: We understand that.

Mr. Resnik: There were so many places at which one could take issue with the well written statement by Mr. Dobrzensky that I am afraid my reply will be somewhat [22] disjointed.

I was a little amused to hear the great patriotic

appeal and the fact that this great company stemmed the rise and the swell of world communism. I think that one could better answer its patriotic duty by paying its just tax. But be that as it may, the stipulation that has been filed is a voluminous document. It contains a lot of words and a lot of exhibits. What the petitioner is attempting to do by the stipulation is to snow under those who consider it, and I think that the snow that will fall will melt rapidly because, as your Honor will see by going through the stipulation, every \$18. item is glamorized with a multitude of documents.

The simple facts in the case are these: a Panamanian corporation was formed sometime in 1947 as a result of the incorporation of part of the fortune of the Swedish capitalist, Axel Wenner-Gren. Prior to the incorporation of this petitioner, Mr. Wenner-Gren, who was the holder of thousands and thousands of shares of Electrolux and Servel stock, both of which companies I believe he had some point in forming, had come into this country and had borrowed substantial sums of money from American banks to be used in enterprises elsewhere, particularly in Mexico. His attorney in fact in the negotiations of those transactions was one Grover Turnbow, who became the president of this petitioner.

Late in 1947 this petitioner qualified to do business [23] in the State of Nevada by the appointment of a resident agent whose business it is to act as resident agents for foreign corporations. The address used by this petitioner, P. O. Box

2540, Reno, Nevada, is the post office box of this resident agent's company. Not a single person connected with this tax payer was in Reno at that post office box. This corporation, the petitioner here, when it came into the country took over the loans of Mr. Axel Wenner-Gren and became the holder of the shares of stock in these American companies. Clearly as the holder of the shares of stock in the American companies which were paying handsome dividends, this tax payer would have to pay a handsome tax; so capable tax counsel at once would see that, in order to avail oneself of the dividends received credit, there has to be created an aura of business activity because the Code had been amended in 1942 to preclude a foreign corporation from qualifying merely by having an office in the country. At one time the tests were two, either doing business or having an office. After 1942, in order to close the loophole that existed prior thereto, the Congress said that the foreign corporation had to do business.

Now, what did this company do? It had the stock which was pledged for the loan, had paid interest on these loans in fabulous amount because they were fabulous loans being used to acquire the big operating utilities of Mexico. It had income from the dividends. That is all that appears on [24] these returns, and that is all that appears in the stipulation—some loans and some dividends received. Apparently realizing that that wasn't enough, since under the cases that clearly isn't enough, someone came along with the brilliant idea



that they would add a little meat to the skeleton and have this company sell cans.

Now, how was that done? Mr. Turnbow, through a company that he wholly owned, called the International Dairy Supply Company, which had its office over in Oakland and which occupied substantially all of the time for Mr. Turnbow and his staff, received a contract from the armed forces for the sale of milk in the Far East. In connection with that contract, it was necessary to have cans in which to send the ingredients to these foreign countries. Mr. Turnbow, through International Dairy Supply, contacted one of the large canning companies here in the city, San Francisco, Western Can Company, and commenced the ordering of these cans pursuant to this contract, and paid for them.

In December of 1948, for the first time, Continental Trading Company appears on the scene, and it transmits to Western Can Company an order for the precise type of cans that International Dairy Supply had previously ordered, precise to the extent that they were made to the specifications of this army contract. The price paid by Continental Trading was the same price that International Dairy Supply had paid. The [25] order emanated out of Mr. Turnbow's office. Mr. Turnbow, in turn, wrote to himself, or the International Dairy Supply, which was Mr. Turnbow, wrote an order to Continental Trading for these cans. So in 1948 we have one order of tin cans that Continental Trading ordered for the account of International Dairy Supply which was shipped, as was

necessary under the contract, to some milk company outside of the State of California. For some reason that is not now discernible, International Dairy Supply consented to roughly a 5 per cent increase in price over what it could have gotten and it had gotten prior thereto.

That is the business activity of this corporation in 1948. It had one order of tin cans.

The Court: You mean the 5 per cent was the profit?

Mr. Resnik: Yes. The profit on that transaction out of the \$823,000. of income, shown on the return, and the profit on that transaction was \$120.64.

Now, in 1949, apparently having come upon a very clear method of embellishing the business purpose of Continental Trading in order to save what we see, deficiencies of a half million dollars, they continued the same circuitous routing of orders of tin cans, and in 1949 more orders were secured as routed, and what we find happens is this: that out of \$605,000. of income reported on the return, Continental Trade made a gross profit there of about \$3500. on cans. [26] Now Continental Trading carried no inventory of cans. It so states. It wasn't in the business of having inventories. It merely called over these orders. When I say it called over the orders, Mr. Turnbow's staff at International Dairy Supply called over the orders just as they had done before the Continental Trading Company appeared on the scene and just as they immediately after Continental left the scene, and as they are still doing today. So in 1950 we

find the same pattern; out of a half million dollars of income, a few thousand dollars results from this circuitous can transaction.

It is interesting to note that Continental Trading didn't have a single salaried employee in this country in 1948 or 1949, and the only one who earned any salary in 1950 was the president, Mr. Turnbow, who got a salary that is covered in the stipulation. So that the means that were gone through on these can transactions certainly should not be regarded by this Court as giving sufficiently to this corporation to permit it to defeat its just taxes.

Our position really is twofold. First, we say on the principal issue that irrespective of the characterization of the activities, we don't believe that they are of sufficient character and type to qualify this foreign corporation as a resident one.

Secondly, we say that if the Court were to regard these transactions as sufficient in number and character to [27] qualify, absent other circumstances, the circumstances relating to these transactions are such that they should not be dignified to permit this corporation to qualify as a resident corporation.

Actually, the broad issue that the Court faces is not really one of whether this corporation was or was not engaged in business. It is an issue that veers closely to the type of cases where we talk about substance versus form, or the presence of necessary business purpose. And as will be brought out here, and I am certain that Mr. Dobrzensky will agree with me at least in this respect, that he is a very capable if not an outstanding tax man.

The fees that his firm receives are all stipulated. They were fairly handsome and certainly — certainly under the state of the record as it will be presented to this Court, it must be clear that a corporation dealing in millions certainly would not have undertaken such a circuitous activity of ordering cans for any other purpose than one to defeat the just taxes that it should be paying here.

Just one point with reference to the question of deductions. In the absence of anything in the petition with reference to it, we can merely stand on the statutory notice of a full disallowance on either theory, whether the corporation is found qualified or not.

Mr. Milton W. Dobrzensky: On the contention [28] erroneously that the corporation qualified in Nevada in 1947, it was March 13, 1948.

Mr. Resnik: 1948, yes.

Mr. Stacey H. Dobrzensky: We are ready to proceed, then, your Honor, and will call as our first witness Marion O. Palmer.

If I may, before the witness steps forward, your Honor, I would like that the stipulation be offered in evidence if that wasn't accomplished by the previous filing; the stipulation of facts, the two stipulations, for that matter.

The Court: I think they were both received. Now they are not exactly evidence. They take the place of evidence, but they are in the record.

Mr. Stacey H. Dobrzensky: All right, your Honor.

Mr. Resnik: I was wondering whether at this time we should attempt to stipulate orally with

reference to the other matters or whether that should await the receipt of testimony.

Mr. Milton W. Dobrzensky: That is agreeable with us.

The Court: My suggestion would be that you do it now, and the way the testimony goes may be affected by what you have stipulated to.

Mr. Milton W. Dobrzensky: Subject to the objection [29] that the testimony offered were irrelevant and immaterial, we will stipulate that prior to the salary payments which were made to Mr. Turnbow, as stated by Counsel, no salary payments were made to any officers of petitioner—by petitioner to its officers in 1948, 1949 and 1950.

Will that cover that?

Mr. Resnik: And no salary payments were made to any persons who might be considered employees.

Mr. Milton W. Dobrzensky: In the United States.

Mr. Resnik: Yes, in the United States.

Mr. Milton W. Dobrzensky: Our position is that the question is what were transactions, and that in view of the determination made in the Hobby case that the purpose is immaterial, and that the question is: were the transactions in fact what they appeared to be in form? We would submit that inasmuch as that might relate to purpose, it would be both irrelevant and immaterial. Nevertheless, we will stipulate to the facts subject to that objection.

The Court: You don't require a ruling at this time?

Mr. Milton W. Dobrzensky: No, your Honor.



There is one exception to that just called to my attention. The resident agent fees in Nevada were paid.

Mr. Resnik: Yes, that is stipulated. The resident agent fees were paid to the resident agent in Nevada. There [30] are other facts that can be stipulated, and if the stipulation can be agreed upon we will eliminate the necessity of calling a witness, and Mr. Dobrzensky stated he would agree to that.

Perhaps I can state the facts and have Mr. Dobrzensky correct them if any correction is deemed necessary.

Mr. Stacey H. Dobrzensky: Which witness are you referring to now?

Mr. Resnik: The matters I will be covering now would have been the subject of testimony by Mr. Russell G. Smith, executive vice-president of the Bank of America.

Mr. Stacey H. Dobrzensky: I wonder if we couldn't, with respect to any testimony with respect to him, agree amongst ourselves without taking the Court's time. I don't think it would affect any testimony I would produce. It would save that much time. I am sure we can agree.

Mr. Resnik: That is exactly what I propose to do.

The Court: It would have this advantage: since you would produce this witness as part of your case, you can wait until your case to make the stipulation, I should think.

Mr. Resnik: We could. The only thing is, actu-

ally what I have to offer is nothing more than what could possibly have been added to the stipulation. Some of the documents are somewhat incomplete, but I would just as well defer that.

The Court: Thank you.

Mr. Milton W. Dobrzensky: Will you give us a copy [31] of that letter in the meantime? That is, the one from Russell Smith, so we will have one for our files.

The Court: That is all, Mr. Resnik?

Mr. Resnik: That is all at this time.

Mr. Stacey H. Dobrzensky: The petitioner will call Marian O. Palmer as the first witness.

Whereupon,

#### MARIAN O. PALMER

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please, and state your name and address for the record?

The Witness: My name is Marian Palmer, 126 Cornelia Avenue, Mill Valley, California.

Mr. Stacey H. Dobrzensky: We are guilty of a grievous error in spelling the lady's name in the stipulation and call it to your attention. We thought it was right. It was M-a-r-i-o-n, but it is M-a-r-i-a-n, so may that stipulation stand as corrected.

#### Direct Examination

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, were you employed by Mr. Grover Turnbow during the years 1948, 1949 and 1950?

(Testimony of Marian O. Palmer.)

A. Yes, I was. [32]

Q. And when were you first employed by Mr. Turnbow?      A. In 1925.

Q. Are you still employed by him?

A. Yes, I am.

Q. What is the capacity in which you are employed by him?

A. I am Mr. Turnbow's secretary, person, confidential.

Q. Is that the capacity that you held during the years 1948, 1949 and 1950?      A. Yes, it is.

Q. You have been that all the while, as a matter of fact?      A. Yes.

Q. Was Mr. Turnbow president of Continental Trading, Inc., Miss Palmer?      A. Yes.

Q. And in the years 1948, 1949 and 1950?

A. Yes.

Q. Was he the president of International Dairy Association, Inc.?      A. Yes.

Q. A Panamanian corporation?      A. Yes.

Q. Was he the president of International Dairy Supply Company? [33]      A. Yes.

Q. That is the company, is it not, that had the Government contract for producing milk for the Far East Command?      A. Yes.

Q. That is their supply company?

A. International Dairy Supply.

Q. And was he the president of International Dairy Engineering Company which came into being toward the middle of 1950; is that correct?

A. That's correct.

(Testimony of Marian O. Palmer.)

Q. Where did Mr. Turnbow maintain his offices?

A. At 1106 Broadway, Oakland, California.

Q. That is during the years 1948, 1949 and 1950?

A. Yes.

Q. Where did he maintain his office as president of Continental Trading?

A. At that same address.

Q. Where did he maintain his office as president of International Dairy Supply Company during those years?

A. At that same address.

Q. Did Mr. Turnbow's name, the name of Continental Trading, the name of International Dairy Supply Company, appear on the door of his offices and the building directory during those years? [34]

A. Yes.

Q. And the International Dairy Company, when it came into being, was it added?

A. Yes.

Q. As Mr. Turnbow's personal secretary, Miss Palmer, do you have knowledge of all or most of his business activities?

A. Yes.

Q. In fact, you have for all the years you have worked for him, is that correct?

A. Yes.

Q. You have knowledge, do you, of his activities as president of Continental Trading?

A. Yes.

Q. Will you describe briefly as to your knowledge of his activities during the years 1948, 1949 and '50 as president of Continental Trading? I don't mean everything he did, but indicate to us the kind of things he did.

A. He negotiated loans with various organiza-

(Testimony of Marian O. Palmer.)

tions, paid interest, issued instructions to me as to payment of interest.

Q. Did he engage in any other activity outside of the payment of loans and for the matters you have just mentioned?

Mr. Resnik: That is leading, your Honor. I think the witness has testified. In any event she gave an answer to the question. It has been asked and answered. [35]

Q. (By Mr. Stacey H. Dobrzensky): Were you present in Mr. Turnbow's office at any time during the years in question in which there were persons present with him in which there were discussions of the affairs of business of Continental Trading?

A. Yes. This International Dairy Association was established as a means of seeking to—

Mr. Resnik: The witness has answered the question, your Honor, I submit.

Mr. Stacey H. Dobrzensky: I will ask a further question, Counsel.

Q. (By Mr. Stacey H. Dobrzensky): Was there a discussion in your presence by Mr. Turnbow and any other person in those offices of the proposal to establish milk plants in various parts of the world?

Mr. Resnik: I object, your Honor. The question is leading, and if it is offered merely to establish the fact that a discussion was had, it wouldn't have any probative value, and otherwise if it is offered it would be hearsay. Mr. Turnbow would know.

The Court: It would be hearsay? How?



(Testimony of Marian O. Palmer.)

Mr. Resnik: As to us, she would merely be reporting that she overheard a conversation.

The Court: So would Mr. Turnbow.

Mr. Resnik: Mr. Turnbow was the participant in the [36] conversation.

The Court: I understand that this witness says that she was present. She heard what was said back and forth, the same as Mr. Turnbow. If you say it is hearsay, he couldn't testify any more than this witness could.

Mr. Resnik: Be that as it may, certainly this witness can't testify to it to prove the truth of the assertions themselves. The fact that conversation was had doesn't advance us in this case. They could have been talking about any number of things.

The Court: I might be mistaken, but I take it this is being offered merely as proof of the fact that the conversation took place.

Mr. Stacey H. Dobrzensky: That is correct, your Honor.

The Court: Do you want a ruling?

Mr. Resnik: I merely say—then my objection as to hearsay would not stand, but my objection to the fact it was leading still would.

The Court: I think Counsel will agree it is leading, and I am going to ask Counsel to be careful not to lead the witness any further.

Mr. Stacey H. Dobrzensky: Yes, your Honor.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, in your contacts with Mr. Turnbow, as [37]

(Testimony of Marian O. Palmer.)

his secretary, did he discuss with you and you with him the activities in which he engaged on behalf of Continental Trading, either in the giving of instructions to you or otherwise? A. Yes.

Q. What type of activities did he discuss with you, if you can recall any other than the ones you have previously indicated?

A. Continental Trading sought to establish re-combining milk plants in foreign countries, what we call deficit milk areas, and for that purpose many people came to talk with Mr. Turnbow in my presence; in the presence of others, also. I remember specifically Mr. John Holroyd-Reece of London with Dr. Dorothy Franchetti of Florence, Italy, who came to endeavor to work out plans and specifications for the establishment—

Mr. Resnik: I submit, your Honor, this witness is not testifying as to conversations overheard. She is giving characterizations as to activities by this petitioner, and as secretary to Mr. Grover Turnbow she may well have overheard them, and perhaps we will have to sit by and hear that, although I think it is completely immaterial.

Mr. Stacey H. Dobrzensky: Counsel, you don't have to hear any more because Mr. Turnbow can tell you of the extensive negotiations, and that is the last of this series of [38] questions of this witness.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, were you instructed by Mr. Turnbow to perform any acts for Continental Trading?

(Testimony of Marian O. Palmer.)

A. Yes.

Mr. Stacey H. Dobrzensky: May I show these to the witness, your Honor?

The Court: Yes.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I show you a group of papers, across the top "International Dairy Supply Co." and ask you if you can identify these and tell me where they came from?

A. These are purchase orders emanating from the purchasing department of International Dairy Supply Company, addressed to Continental Trading, Incorporated.

Q. And do you know whether or not these are from the files of Continental Trading or of International Dairy Supply? In fact, those are the ones received by Continental, are they not?

A. These are the ones received by Continental.

Q. Miss Palmer, these were received where and by whom?

A. Well, they were received by me in Oakland.

Q. In Oakland. That is, at the 1106 Broadway office?

A. Yes.

Mr. Resnik: Can you ask her where they emanated from? [39]

Q. (By Mr. Stacey H. Dobrzensky): Can you state where these emanated from?

A. From International Dairy Supply Company, their procurement department.

Q. And in answer to Counsel's question, they

(Testimony of Marian O. Palmer.)

came from the same suite of offices, the same floor of the building?

A. From the same floor of the building, yes.

Mr. Stacey H. Dobrzensky: I would like to offer these as petitioner's next in order, your Honor, as a unit. There are 86, and they are in a bundle; we totalled them this morning.

Mr. Resnik: If your Honor please, I thought we were going to avoid the necessity of doing just this by our stipulation which contains an exemplar of this, and which contains a number. I, of course, can't object to their receipt other than on the grounds that they are accumulative of what we sought to avoid by our stipulation.

Mr. Stacey H. Dobrzensky: The purpose in offering them is that what is set forth in the transaction, the reality of these transactions is being challenged. The best evidence of that is the very document by which they occurred.

Mr. Resnik: Clearly not, your Honor. They could have had ten pieces of paper for each one of these cans. That is our point entirely. The more paper——

The Court: I thought we probably agreed that these [40] have to be received in any event, and as far as the argument of their probative value or the effect on the case, you won't gain anything by arguing now.

They will be received and marked in evidence, one exhibit.

(Testimony of Marian O. Palmer.)

The Clerk: Petitioner's Exhibit No. 32 is received in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 32.)

Q. (By Mr. Stacey H. Dobrzensky): Now, Miss Palmer, you testified that you received the orders from International Dairy Supply Company that were just received in evidence, and you stated that you had received instructions from Mr. Turnbow with respect to these orders, when they were received. What was the next thing that you did?

A. Continental Trading issued a purchase order to the corporation from whom he was making the purchase.

Mr. Resnik: If the Court please, in order to avoid making objections, I would appreciate—I think perhaps Counsel would agree if they were to instruct the witness not to deal in terms of corporate activities, but in terms of individuals who did these things, then I think that might permit us to move along more rapidly and not defeat the point [41] they are seeking to establish.

Mr. Stacey H. Dobrzensky: If the Court please, what Counsel is saying, I think, is that Miss Palmer should each time say, "I wrote the words 'Continental Trading Inc.' and then signed my name," when she means that by saying Continental did so and so, and will add to each answer, I am sure, a number of words. I don't see any validity in the objection simply because it was Continental. If he



(Testimony of Marian O. Palmer.)

wishes to establish that somebody else did it besides Continental through its agent, then it would be——

Mr. Resnik: We have stipulated here that Continental had no employees here.

Mr. Stacey H. Dobrzensky: No paid employee, Counsel.

The Court: I think Mr. Resnik is making a point that unless the statement is made as to who did it, that the witness is stating a conclusion.

Mr. Stacey H. Dobrzensky: All right, your Honor.

Mr. Resnik: That is correct, your Honor.

Q. (By Mr. Stacey H. Dobrzensky): You were saying, Miss Palmer, that Continental did something. Would you state what was done and who it was done by ?

A. I issued orders for Mr. Turnbow asked that these orders for Continental Trading on behalf of Continental be [42] prepared by myself or an assistant and mailed to the corporation from whom we were making the purchase.

Q. Now, I will show you a further series of papers bearing at the top the words, "Continental Trading Inc.," and ask you if these are the purchase orders to which you have just referred?

A. Yes, these are the purchase orders.

Q. They are, in fact, your retained copies, are they not?      A. Yes.

Mr. Stacey H. Dobrzensky: I am sorry, Counsel, I thought I showed them to you as a whole.

I might state, your Honor, and I am sure Coun-

(Testimony of Marian O. Palmer.)

sel agrees, that these are all except those that appear as exemplars in the stipulation.

Q. (By Mr. Stacey H. Dobrzensky): I think you just testified, Miss Palmer, that these are the retained copies of purchase orders prepared by you on the Continental Trading form? A. Yes.

Q. And what was done with the original after it was prepared?

A. The original was mailed to the company or individual to whom it was addressed.

Q. These, I think, all are addressed to Western Can, [43] are they not?

A. Western Can Company, if that is where they are addressed to.

Mr. Stacey H. Dobrzensky: I would like to offer these, if the Court please, as petitioner's next in order. Counsel has some questions with respect to one of the documents.

Mr. Resnik: May I take the witness?

#### Voir Dire Examination

Q. (By Mr. Resnik): I show you, Miss Palmer, one of the documents in the bundle that Mr. Dobrzensky referred to, more particularly caption "Purchase order No. 168" and bearing the pencilled note "B-1074" to which is attached a pencilled note. Are you familiar with the pencilled note attached to it?

A. Yes. I mean, now that you show it to me I can see it.

Q. What is that pencilled note?

A. It appears to be an order from — signed by

(Testimony of Marian O. Palmer.)

one of the staff of the procurement department of——

Q. By whom is it signed?

A. ——of the supply company.

Q. By whom is it signed?

A. The name is signed Gertrude.

Q. And who is Gertrude? [44]

A. She was a clerk for the supply company.

Q. What was her last name?

A. Let's see. I believe it was——

The Court: Mr. Resnik, this is what is bound to happen when you stand close to the witness. It may be difficult, but I am going to ask you to stay at the counsel table so we can hear what the witness says.

Even the reporter didn't get the last answer.

Q. Can you answer the question over again, or do you want the question repeated?

Mr. Resnik: Will you read the question again?

(The question was read by the reporter.)

Q. (By Mr. Resnik): What was Gertrude's last name?

A. I believe it was Santos, though I can't be sure.

Q. You will note on the one order that we referred to and on some of the subsequent ones there are either pencilled or pen notations changing the amounts. Do you know in whose handwriting they appear? A. No, I don't.

Q. Did you make them?

A. No, they are not my handwriting.

Q. Do you recognize the handwriting?

(Testimony of Marian O. Palmer.)

A. No, I answered that question.

Q. Did you prepare each and every one of the documents? [45]

A. Yes. These were prepared at my instructions. I signed them.

Q. You didn't make the changes, then, from the typewritten to the pencil? A. No.

Q. Do you know the significance of those changes?

A. I presume that they must have been what was actually shipped.

Q. Do you know? A. No.

Mr. Resnik: I have no further questions.

The Court: We will take a ten minute recess.

(Short recess.)

Mr. Stacey H. Dobrzensky: I believe, your Honor, I had offered the series of 88 Continental Trading orders to Western Can, and Counsel had interrogated the witness with respect to them.

The Court: I haven't heard his position.

Mr. Resnik: I propose the objection to that receipt, first, on the grounds that it is cumulative; second, on the grounds that the proffered documents contain material not within the knowledge of this witness or any witness who has been offered. Therefore, I would think that the exhibit is subject to defect and cannot be received in evidence.

Mr. Stacey H. Dobrzensky: If the Court please, the [46] offer is on the basis that these are the documents from the file of Continental Trading as retained copies of orders sent to Western Can. The

(Testimony of Marian O. Palmer.)

witness testified to that fact, and with respect to the handwriting that the witness can identify. We are willing that they can be disregarded. The purpose of offering these is to establish——

The Court: Let me cut it short, if I may, and ask you; by that, you mean that you are offering these documents without including the notations that are made by anybody but this witness, is that correct?

Mr. Stacey H. Dobrzensky: That is correct.

Mr. Resnik: I think they would be objectionable because the notations go to the heart of the documents themselves. They change the amount.

The Court: May I see them, please?

Mr. Resnik: Yes, your Honor. In view of the fact there are a number I will put them in order. Beginning at this point you will find changes in pen and ink.

The Court: Well, there would be nothing to it, then, would there?

Mr. Resnik: If your Honor please, might I be heard for a moment on this? We worked very hard—I worked very hard trying to stipulate as to this. We have given the form of these activities in the stipulation. We don't deny that cans were ordered or the number of them. In fact, if your [47] Honor please, looking at the stipulation, there is a schedule attached.

The Court: Well now, Mr. Resnik, if you don't mind I am going to overrule your objection as far as the cumulative aspect of this. I am concerned



(Testimony of Marian O. Palmer.)

with what the state of the record is about this matter of notation.

Mr. Stacey H. Dobrzensky: As was said by a law professor, it is unfortunate each course in law school can't precede the other courses, and this might also apply to exhibits. These exhibits will establish the correlation between the changes that Counsel was inquiring about and the actual shipment of goods.

The Court: It is possible you should mark this for identification until that has been established.

Mr. Stacey H. Dobrzensky: I withdraw the offer and ask that it be marked as petitioner's next in order.

The Court: For identification?

Mr. Stacey H. Dobrzensky: For identification, yes, sir.

The Court: Will you take it, Mr. Clerk, please, and mark it for identification?

The Clerk: Petitioner's Exhibit No. 33 is marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 33 for identification.)

Direct Examination—(Resumed)

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I show you a further series of papers totaling 93 in number, stapled in the corner.

Mr. Resnik: 92 in number.

Mr. Stacey H. Dobrzensky: I beg your pardon, 92. We took one off.

(Testimony of Marian O. Palmer.)

Q. (By Mr. Stacey H. Dobrzensky): Across the top it has "Western Can Company", and I ask if you can tell me what these documents are?

A. These are invoices from Western Can Company addressed to the Continental Trading Company. Attached are checks of Continental Trading Company in payment thereof.

Q. Are these documents in the files of Continental Trading? A. Yes.

Q. Were they received at the 1106 Broadway office? A. Yes.

Q. Received by you? A. Yes.

Q. Who prepared the checks that are attached?

A. I prepared the checks.

Mr. Stacey H. Dobrzensky: I will offer, then, the Western Can Company invoices just identified by the witness, with the checks attached totaling 92 in number, as a unit as [49] the petitioner's next in order, your Honor.

Mr. Resnik: May I take the witness briefly on the exhibits, your Honor?

The Court: Yes.

#### Voir Dire Examination

Q. (By Mr. Resnik): Miss Palmer, I notice on a number of the invoices received from Continental Can the initials "JW". Are those the initials of J. Wickersham? A. Yes, sir.

Q. J. Wickersham was a purchasing man of International Dairy Supply, was he not?

A. Yes.

(Testimony of Marian O. Palmer.)

Q. J. Wickersham was the man who prepared the order forms, petitioner's Exhibit No. 32 in evidence? A. Yes.

Q. Were those initials of Mr. Wickersham put on the document that is before you prior to the time that you wrote the check?

A. Well, I really couldn't say, but I presume they were. Of my own knowledge, I do not know.

Q. When the invoice came out, did it have those initials on it? A. Not necessarily so.

Q. What purpose did those initials serve? [50]

A. I don't know.

Q. Did you ask Mr. Wickersham to check out the amounts of the invoices before you wrote the check?

A. Those initials are only on a few of these.

Q. That is correct, not on all?

A. As I said, I don't know.

Q. I call your attention, Miss Palmer, to invoice No. 4209 dated April 21, 1949, and direct your attention to the printing and writing in pen appearing thereon, which says as follows: "Add 5 per cent when billing Dairy Supply. Dairy Supply bills Caldwell at cost."

Can you identify that handwriting?

A. I think the first handwriting is that of Mr. Wickersham. The second I don't think is his. It doesn't look to me like it.

Q. When you talk about the first, what does that encompass?

(Testimony of Marian O. Palmer.)

A. It says, "Add 5 per cent when billing Supply Company."

Q. And what is the second?

A. It says, "Dairy Supply bills Caldwell at cost."

Q. Was that in your handwriting?

A. No, it is not my handwriting.

Q. Isn't that also in the handwriting of Mr. Wickersham?

A. It may be. They don't look exactly alike to me.

Q. You can't identify the so-called second handwriting? [51]

A. Not positively, no.

Q. Was that on that invoice when it came to you?

A. I don't recall.

Q. In what amounts would you write the checks covered by those invoices?

A. In this particular case, the total amount of the invoice noted is \$1,863.83. I would deduct 1 per cent and make out a check for that amount.

Q. Was that done on each invoice?

A. If it wasn't it was an error. It was supposed to have been done that way.

Q. You mean to say that every time an invoice came in you wrote a check for that particular invoice?

A. No. I think you will find that several invoices are covered by one check.

Mr. Resnik: I will have further questions with reference to the materials covered, but I will not pursue the voir dire examination. However, I will

(Testimony of Marian O. Palmer.)

interpose an objection to the receipt of the documents on the basis of the examination. The witness apparently is not familiar with all of the notations and legends appearing on the document, many of which may be significant, if they are to be received.

Mr. Stacey H. Dobrzensky: If the Court please, we are offering these, as I previously indicated, for the sole purpose of establishing the number of the transactions and the [52] occurrence of the transactions by producing the records that establish each step of each transaction. The exemplars of all these transactions are already stipulated to in the form of the transaction, the form of the document. Counsel indicated surprise at these being produced at the trial, having forgotten the conversation which we had and in which it was discussed that rather than to have put these in the stipulation, I think he suggested that either party would be free to offer any other document he might have, and we did not want to put the total mass in the stipulation; that is my recollection of it. I wish to offer these as the document—in the case of the ones in the witness' hands, the invoice from Western Can to Continental Trading and Continental Trading check in payment of it, less the 1 per cent discount, or in certain cases a single check for a series of invoices, as being exactly what they are. She has identified the documents as being from the files of the corporation and being their records of these transactions.

What I will point out in a moment, your Honor, in these two exhibits is when there are changes on



(Testimony of Marian O. Palmer.)

the Continental Trading orders to Western Can, which is marked for identification as petitioner's No. 33, the changes appearing thereon are based upon the shipment by Western Can pursuant to the order, and some smaller amount or slightly larger amount than was ordered. If the order said 6,000 units and 6,003 units [53] are shipped, then there appears a notation on the exhibit for identification, 33, of the appropriate document a change in ink. It was obviously placed upon there by someone after the invoice was received.

The Court: In other words, you can take these and check them against the documents appearing in it?

Mr. Stacey H. Dobrzensky: That is correct. In the case of one where it shows the words are added "paper wrap \$10.00." and things of that sort, those facts appear in the billing that the witness has in her hand.

The Court: It is a little difficult to rule on this, Mr. Resnik, because the question I would have liked to have asked was not asked, which would be: were these invoices received in the regular course of petitioner's business. I am sure you would be on your feet in a minute because that is the issue in the case, and yet I don't see how I can rule on it.

Mr. Resnik: If your Honor please, it wasn't my purpose to keep anything out of court. What we tried to do by the stipulation——

The Court: May I interrupt you just a minute. I would like to follow up what I started to say. If

(Testimony of Marian O. Palmer.)

these documents were received admittedly by the taxpayer in the regular course of business, it wouldn't normally be necessary for the person who was identifying them to be able to account [54] for everything that was on the paper which might be prepared by a third person, as they were in this case by Western Can, and they would still be admissible as part of the records of the business. Now, our trouble here, of course, is, as I say, that maybe they weren't received in the regular course of business because maybe there wasn't any course of business. That is what you say. But I am not going to keep them out on that ground because I think that would be prejudging the whole issue in the case, so I will overrule the objection, and this exhibit will be received for what it is worth and marked in evidence.

Mr. Stacey H. Dobrzensky: On the same basis, your Honor—

The Court: Just a minute. Would you let the clerk take care of this first?

Mr. Stacey H. Dobrzensky: I am sorry.

The Clerk: Petitioner's Exhibit No. 34 is received in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 34.)

Mr. Stacey H. Dobrzensky: On the basis of the offer of this last exhibit and your Honor's ruling thereon, may I now offer petitioner's exhibit

(Testimony of Marian O. Palmer.)

marked No. 33 for identification to be received in evidence as petitioner's No. 33? [55]

The Court: The same ruling. It will be received and marked in evidence.

Mr. Stacey H. Dobrzensky: Thank you, your Honor.

The Clerk: Petitioner's Exhibit No. 33, marked for identification, is received in evidence.

(The document above referred to, previously marked for identification, was received in evidence as Petitioner's Exhibit No. 33.)

Mr. Stacey H. Dobrzensky: If the Court please, that is the last of such series.

Direct Examination—Resumed

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I will show you a group of papers with the heading "Continental Trading Inc." printed on the top, and the word "invoice" typed above that. They total 86 by my count, and I will ask you if you will identify those documents?

A. These are invoices of Continental Trading Inc.

Q. Addressed to whom?

A. Addressed to International Dairy Supply Company, 1106 Broadway, Oakland 7, showing—

Q. Pardon me—

A. Showing to whom product was to be shipped.

Q. Are those the—

Mr. Resnik: Pardon me. I didn't get the last part. [56]

(Testimony of Marian O. Palmer.)

The Witness: To whom the produce was to be shipped.

Q. (By Mr. Stacey H. Dobrzensky): Are those the originals or are those retained copies?

A. These appear to be the originals.

Q. Were these prepared by you, Miss Palmer?

A. By me or at my instructions.

Q. Where, for example, on the top one, where it has typed "Continental Trading Inc. by M. O. Palmer," that would be——

A. My signature.

Q. Your signature?           A. Yes.

Mr. Stacey H. Dobrzensky: I would like to offer this series, your Honor, of invoices from Continental Trading Inc. to International Dairy Supply Co. as the petitioner's next in order.

Mr. Resnik: May I take the witness?

Mr. Stacey H. Dobrzensky: This is for the same purpose as the previous similar exhibits. This is the last of a series.

#### Voir Dire Examination

Q. (By Mr. Resnik): Referring to the documents that you identified for Mr. Dobrzensky, you see on those documents again the initials JW. Are those the initials of J. Wickersham to whom we have [57] previously referred?

A. Yes, the two that you have shown me do appear to be.

Q. There are more than two in the file that contain the initials JW, are there not?

(Testimony of Marian O. Palmer.)

A. There are fewer than are without the initials.

Q. Now, directing your attention to invoice No. B-1008, dated May 4, 1949, I see the handwritten legend, "Do not bill Consolidated." Did you write that? A. No, that is not my writing.

Q. Do you know in whose handwriting it is?

A. No.

Q. Do you know what the significance of that is?

A. I do not.

Q. I show you, Miss Palmer, the first of the documents numbered B-1003, and direct your attention to the penned legend, "Bill Caldwell at cost" is that in your handwriting?

A. No, it's not.

Q. Do you know whose handwriting it is?

A. It would be difficult to identify that.

Q. Do you know what the significance of that is?

A. No.

Q. In the course of your activities as secretary for Mr. Turnbow, did you perform any services for International Dairy Supply Company? [58]

A. As his secretary, as his — in his capacity as president.

Q. In fact, he was the sole owner of International Dairy Supply, was he not? A. Yes.

Q. Were you as familiar with the activities of International Dairy Supply Company as you were with the activities of Mr. Turnbow in connection with Continental Trading?



(Testimony of Marian O. Palmer.)

Mr. Stacey H. Dobrzensky: I think, your Honor, this goes beyond the bounds of voir dire.

Mr. Resnik: I believe it does, and I withdraw the question.

Mr. Stacey H. Dobrzensky: Were you going to make an objection?

Mr. Resnik: I make the same objection to this group of documents as I made to the others.

The Court: Same ruling. It will be received and marked in evidence, one exhibit.

The Clerk: Petitioner's Exhibit No. 35 is admitted in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 35.) [59]

Direct Examination—(Resumed)

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, with respect to the invoices that you just identified, which have just been received in evidence, were they paid? That is, was a payment made by International Dairy Supply Company to Continental Trading?

Mr. Resnik: I object. All she would know at best would be whether the check had been received.

Mr. Stacey H. Dobrzensky: I withdraw the question.

Q. (By Mr. Stacey H. Dobrzensky): Were checks received from International Dairy Supply Company in the amount of the invoices that were

(Testimony of Marian O. Palmer.)

sent to them as just received in evidence and received by Continental Trading?

Mr. Resnik: I object to that, your Honor. It is quite clear the stipulation covers it, that a check was transmitted under the name of International Dairy Supply to Continental Trading in connection with each of these transactions. Each is covered in the stipulation.

Mr. Stacey H. Dobrzensky: I fail to see the objection, Counsel. You are stating the thing I am asking the witness did occur.

Mr. Resnik: Then I think it is covered by the stipulation.

The Court: If that is the fact, then it is [60] objectionable if it has already been stipulated.

Mr. Resnik: If your Honor please, I think we can make a lot of progress if we merely understand each other and the Court will understand us. There comes a point of time in cases of this kind where it is difficult in terms of language for each side to get across the point it wishes to make. Certain shorthand expressions sometimes have to be used. Now, suffice it to say that in the stipulation we have tried to cover what is the form of these transactions. There can be no dispute that there were documents of the kind that we have here now.

The Court: Just a minute. I am not sure that you need to argue this point, Mr. Resnik. I haven't heard from Mr. Dobrzensky yet as to whether he agrees that this is stipulated.

Mr. Stacey H. Dobrzensky: If the Court please,

(Testimony of Marian O. Palmer.)

the stipulation in paragraph 11 on page 16 states: "International Dairy Supply Company paid the price of each such carload pursuant to invoice."

What I would like to establish by my question is that we are talking here about transactions. Counsel says there is a mere shell and nothing else. I intended by these questions to show that a check was drawn by International Dairy Supply, was delivered to Continental, was deposited by Miss Palmer in the bank account of Continental in Reno, Nevada, [61] which to me are the intestines, the insides of the substance and reality of it. We have here obvious challenges to the reality of transactions we are satisfied did occur. Counsel stipulated they did occur, but he questions whether or not the manner in which they occurred might be such as to say they can be, must be disregarded. Therefore, by showing that these things did in fact occur in the payment that we have stipulated to, checks were transmitted by one corporation to another corporation and in turn transmitted to its resident agent or directly to the bank in Reno. Those are the things that actually happened that destroy any illusion of any mere form and no substance.

Mr. Resnik: That clearly doesn't establish that.

The Court: Wait a minute, Mr. Resnik: Perhaps it doesn't, but the petitioner wants to put it in; and, having read that, I cannot rule that it violates the stipulation because the stipulation doesn't say how payment was made.

Mr. Resnik: Well, in that event, then I think if

(Testimony of Marian O. Palmer.)

we are interested in how payment was made, then we should receive the actual facts with reference to how payments were made and not the conclusion of the witness that a check was prepared by International Dairy Supply, and so forth.

The Court: I understood Mr. Dobrzensky to say that if you wish he will produce the checks. That, however, I think will really extend the scope of the proceedings. [62]

Mr. Resnik: I am prepared to stipulate to all of these facts. I thought we had. I would be glad to do it.

The Court: It is a very simple matter. The question of the witness was a check drawn for each one of these invoices. If you were to allow the witness to answer that question, that would be the end of it, wouldn't it?

Mr. Resnik: No. What I am prepared to stipulate is that there was received in the internal transactions at 1106 Broadway in Oakland a check drawn on the bank account of International Dairy Supply made payable to Continental Trade Company in the amounts of these invoices, Exhibit No. 35.

Mr. Stacey H. Dobrzensky: I will accept that, your Honor, as being entirely satisfactory.

Mr. Resnik: I don't deny that, your Honor.

The Court: Now, just a minute. You offered to stipulate it, and Mr. Dobrzensky says he agrees, and that will take care of it; is that correct? Thank you.

(Testimony of Marian O. Palmer.)

Mr. Resnik: If I may be heard further with reference to that, in order that our position is not prejudiced, and in order that we can comply with the Court's rules and stipulate, we are not attacking the form of what was done. That was done and it is before the Court. We want the Court to have it. The question transcends that, and we don't want, by our stipulation, to have the Court conclude that we have gone beyond that. As I say, it is difficult many times in the [63] language to make our position clear, but we cannot impugn the fact that certain form was done, a certain form——

The Court: I think we understand each other.

I take it you are withdrawing that last question?

Mr. Stacey H. Dobrzensky: Yes, your Honor, in favor of the stipulation.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer,——

Mr. Resnik: You don't have to ask the witness to identify them. You can tell the Court and I will object to it, and I think we covered all of that.

Mr. Stacey H. Dobrzensky: If the Court please, Counsel has indicated without identification of the witness I might state to the Court the documents I hold in my hand. There is a series, 6 bundles, each of which contains first on the heading of Bank of America, International Banking Department, the document entitled "Credit advice" bearing a date of December 14, 1949, addressed to—it says to Continental Trading Inc., 1106 Broadway, Oakland, attention Mr. Grover D. Turnbow, and these are the



(Testimony of Marian O. Palmer.)

credit advice showing they were deposited to the account of Continental in connection with sales of certain Serval stock, the sale of which and the terms of which are stipulated to.

Again, as in the previous series of documents, I wish to offer these on the same basis as I previously offered [64] the other documents. In each case they also contain a deposit slip on the First National Bank of Nevada at Reno, a duplicate deposit slip showing the deposit amount noted on the credit advice forwarded by the bank. I wish to offer this as petitioner's next in order. Counsel indicates that he has an objection to it, although he stated he need not examine the witness. I would like to ask the witness one question, however.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, these documents that I have just described, you are familiar with them, are you?

A. Yes.

Q. And they are the credit advices with the attached notification slips received at the 1106 Broadway office of Continental, is that correct?

A. That's correct.

Mr. Resnik: If your Honor please, beginning at page 10 of the stipulation the whole of the transaction is covered. Now, apparently what the petitioner is trying to do they did in part in the stipulation, and what they are trying to do here is snow us under with every little thing. As your Honor knows, if you want to pay a dollar phone bill, you can have twenty documents referring to it. What

(Testimony of Marian O. Palmer.)

we tried by the stipulation was to place in capsule form what was done. I tried, but I was overruled too frequently by the petitioner, [65] and the stipulation got out of hand. They are apparently not content and want to add to the stipulation when it, in itself, is complete.

Mr. Stacey H. Dobrzensky: If the Court please, I am sure Counsel knows we are not attempting to snow anybody. They are challenging here the reality of these transactions, and on that issue we wish to offer these documents, the facts as to what occurred are stipulated to. The stock was sold; certain prices deposited in a bank account. Now here are the underlying instruments that show the reality of that as opposed to the unreal picture that Counsel paints.

The Court: Where was that referred to?

Mr. Resnik: Page 10 of the stipulation, Roman V and subsequent.

Mr. Stacey H. Dobrzensky: I can point out that, your Honor, in Roman V there are annexed the documents that show the consummation of the sale of the 10,000 shares. The documents I am offering are the ones in the same position with respect to the sales referred to in the next paragraph, being Roman VI.

Mr. Resnik: The obvious effect of all that has gone on and what is sought to be done here now is to duplicate the stipulation and apparently create the impression that twice as much was done than was in fact done.

(Testimony of Marian O. Palmer.)

The Court: I suppose you would have been willing to [66] stipulate at one time, wouldn't you, that a sentence to a similar effect could have been added to each of the subdivisions of Roman VI similar to what now appears in Roman V?

Mr. Resnik: Yes. We have no objection to that, your Honor. As I say, it was unnecessary then, and I believe that is wholly unnecessary now.

The Court: It perhaps is, from your standpoint. The petitioner wants to get it in again, since I can't say it contradicts the stipulation any more than this one sentence contradicted the stipulation in V, I will overrule the objection and the exhibit will be received and marked in evidence, one exhibit.

Mr. Stacey H. Dobrzensky: Yes, your Honor. They are stapled, so they may be so treated.

The Clerk: Petitioner's Exhibit No. 36 is admitted in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 36.)

Mr. Stacey H. Dobrzensky: I have just one additional question. I had my eye on the clock. Then I will be through with this witness.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, you have previously testified with respect to certain records, specifically the exhibits just received in evidence, and that series just received of purchase [67] orders, invoices, checks, and that series. In addition to those, what records were maintained by you at the Continental Trading office at

(Testimony of Marian O. Palmer.)

1106 Broadway, or elsewhere, where you may have maintained them?

A. We had the bank statements, check books, and copies of statements to Continental Trading, to the head office.

Q. When you say the head office, you are referring to the office mentioned in the stipulation; that is, at Mexico City?      A. That's right.

Mr. Stacey H. Dobrzensky: That is all the questions we have of this witness, your Honor.

The Court: You will have some cross examination?

Mr. Resnik: Yes, your Honor.

The Court: You won't object if we recess now?

Mr. Resnik: No, not at all.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:05 p.m., a recess was taken until 2:00 p.m. of the same day.) [68]

After Recess, 2:15 p.m.

The Court: Now we are ready to proceed.

The Clerk: We will proceed with Docket No. 55212.

Mr. Stacey H. Dobrzensky: At the time of the noon recess I had concluded the direct examination of Marian Palmer, and I imagine you wish to proceed with the cross examination.

Mr. Resnik: Yes. Perhaps before we begin the examination of the witness, in order to expedite the

hearing of the case, I will ask Mr. Dobrzensky if he will stipulate with me a fact which I thought was in the stipulation but apparently is inadvertently omitted, that Mr. Grover Turnbow, whom we have here referred to and who is referred to in the stipulation, was a stockholder of International Dairy Association.

Mr. Stacey H. Dobrzensky: The stipulation, I think, shows he was a 10 per cent stockholder. We added the paragraph toward the end of our discussion. If it isn't there, we can certainly stipulate to it—on page 4, paragraph 11.

Mr. Resnik: Yes, thank you. I see it now.

MARIAN O. PALMER

resumed her testimony as follows:

Cross Examination

Q. (By Mr. Resnik): Miss Palmer, you testified under direct examination that you and Mr. Turnbow, as well as others, of course, [69] occupied office space at 1106 Broadway in Oakland during the years 1948, 1949 and 1950, is that correct?

A. Yes, that's correct.

Q. When did you and Mr. Turnbow move into that office? A. In 1947.

Q. Can you give us a more precise time?

A. It was toward the latter part of May, 1947.

Q. At that time, whose names appeared on the entry to the office?

A. Of course, Mr. Turnbow's, International Dairy Association. At that time I think that was all.



(Testimony of Marian O. Palmer.)

Q. International Dairy Supply Company's name did not appear at that time?

A. Not at that time.

Q. What space—where did you occupy space before that, before moving to 1106?

A. At 1404 Franklin Street, Oakland.

Q. Was that an office? A. Yes.

Q. An office building? A. Yes.

Q. Whose office was that?

A. Mr. Turnbow's office.

Q. What business was he in at that time?

A. He had personal operations of one sort and another. [70]

Q. What names appeared on the door, if any?

A. G. D. Turnbow.

Q. Now then, in 1947, when you commenced occupying the space at 1106 Broadway, that was the sole office space that Mr. Turnbow occupied in this area? A. Yes.

Q. Sole office space he occupied in California?

A. Yes, I believe so.

Q. It was the only office he had? A. Yes.

Q. When was the name International Dairy Supply Company added to the door?

A. I don't recall exactly. I believe it would have been soon after the formation of the corporation.

Q. Do you know who executed the lease for the office space at 1106 Broadway?

A. International Dairy Association.

Q. Who paid the rent?

(Testimony of Marian O. Palmer.)

A. International Dairy Association.

Q. 1106 Broadway, is that an office building in the City of Oakland?

A. Yes, it is the Key System Building.

Q. And you occupied an office on one of the floors? A. We occupied the one floor.

Q. You occupied one floor? [71] A. Yes.

Q. What floor was that?

A. The second floor.

Q. Do you mind speaking up a little bit? I have difficulty hearing you sometimes.

Now, I believe you testified that there came a time when the name Continental Trading Company or Continental Trading Inc., something to that effect, was added to the door? A. Yes.

Q. What was added? What name was added?

A. The corporation's name.

Q. Will you tell us specifically what was printed on the door? A. Continental Trading, Inc.

Q. Not Continental Trading Company?

A. No.

Q. When was that added?

A. Shortly after the formation of the corporation, in 1948.

Q. When was this corporation formed?

A. In 1948.

Q. It is stipulated the corporation was formed in 1947. A. Continental Trading?

Q. Yes.

Mr. Stacey H. Dobrzensky: That is correct, Counsel. [72]

(Testimony of Marian O. Palmer.)

Q. (By Mr. Resnik): Are you familiar with the circumstances whereby the name was added to the door?

A. I ordered it put on the door.

Q. Who ordered you to put it on the door?

A. Mr. Turnbow.

Q. Were you present at a—was there any meeting between Mr. Turnbow and Mr. Dobrzensky, Sr. whereby Mr. Dobrzensky advised Mr. Turnbow to add the name to the door?

A. Yes. Mr. Dobrzensky added—suggested that it be added to the door.

Q. Can you describe for us briefly the nature of the office space that was occupied on the second floor of the Key System Building?

A. I am afraid I don't recall the exact square footage. It seems to me it was in the neighborhood of between six and 7,000 square feet.

Q. Was it divided into offices or one large room?

A. It was divided into offices. In fact, it was divided by a hallway, a corridor of the building that separated it into two sections, the office space, each of those was then divided into offices.

Q. Now, from whom did you receive your salary as secretary for Mr. Turnbow? [73]

A. From Mr. Turnbow.

Q. You received his personal check?

A. Yes.

Q. Was that during 1948?                      A. Yes.

Q. During 1949?                      A. Yes.

Q. During 1950?                      A. Yes.

(Testimony of Marian O. Palmer.)

Q. Were you on the payroll of International Dairy Supply Company?      A. Yes.

Q. So you received a check also from them?

A. In 1950, yes.

Q. To International Dairy Supply Company in 1950 but not prior thereto?

A. I don't believe it was prior.

Q. What about from International Dairy Association? Were you on their payroll?      A. No.

Q. Were you familiar with the operations of International Dairy Supply Company?

A. Yes.

Q. Were you familiar with the fact that in 1948 they received a contract from the armed forces to supply recombined [74] milk to the Far East?

A. Yes.

Q. Were you familiar with the fact that International Dairy Supply Company ordered cans in connection with that contract from Western Can Company?      A. No.

Q. Where did International Dairy Supply Company get its cans, if you know?

A. I don't know. I was not in the procurement department.

Q. What department were you in?

A. Mr. Turnbow's personal office.

Q. It has been stipulated that in 1948, during part of 1948, International Dairy Supply Company ordered cans necessary to carry out this army contract directly from Western Can Company and paid for them.

(Testimony of Marian O. Palmer.)

Mr. Stacey H. Dobrzensky: Counsel, I think in fairness to the witness you should use the language of the stipulation as to the orders because there was a limited number of them specified in the stipulation.

Mr. Resnik: If the witness knows she will tell us. If she doesn't know, she will say so.

Mr. Stacey H. Dobrzensky: Counsel, is it your purpose to contradict the stipulation?

Mr. Resnik: My purpose is to test the credibility [75] of this witness.

Mr. Stacey H. Dobrzensky: After the witness told you she doesn't know, you are going to further test her knowledge?

Mr. Resnik: I am testing her knowledge on other subjects. This is a preliminary matter.

Q. (By Mr. Resnik): It has been stipulated that International Dairy Supply Company ordered cans from Western Can Company, which cans were necessary in the fulfillment of the army contract during 1948, the same or more specifically referred to in the stipulation and Exhibit 23. I show you part of Exhibit 23—

Mr. Stacey H. Dobrzensky: Would you give—is there a sub-number there, Counsel, please?

Mr. Resnik: 2 is the sub-number.

Q. (By Mr. Resnik): Now, am I correct that you testified that you were not familiar with the fact that such orders were placed by International Dairy Supply Company?



(Testimony of Marian O. Palmer.)

A. I testified that I did not know when this started.

Q. But you do know that International Dairy Supply Company needed cans in connection with its army contract? A. Yes, sir.

Q. And you also know that International Dairy Supply ordered such cans from Western Can Company and paid for them?

A. I see this order now that you have shown to me, yes. [76]

Q. By virtue of looking at that order, your recollection is refreshed? A. Yes.

Q. Those are orders prepared by James Wickersham? A. Yes.

Q. James Wickersham, you testified, did you not, was in the purchasing department of International Dairy Supply Company?

A. That's right.

Q. He was on the payroll of International Dairy Supply Company? A. Yes.

Q. He was not on the payroll of Continental Trading? A. No.

Q. Now, also in connection with that same exhibit, you find that some of the orders were prepared by a D. P. Denning. Do you know Mr. Denning?

Mr. Stacey H. Dobrzensky: I am familiar with the name. It is S. L. Denning. The handwriting is hard to read.

Q. (By Mr. Resnik): Are you familiar with him? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Who is he?

A. He preceded Mr. Wickersham in procurement.

Q. He also continued on when Mr. Wickersham came as an [77] employee of one of the companies, did he not?           A. Yes.

Q. In what position did he continue?

A. I don't think I recall exactly.

Q. But he did some work for International Dairy Supply after Mr. Wickersham took over some of the procurement, did he not?

A. Yes. He went out to the Far East to administer some of the details regarding the engineering problems.

Q. On whose payroll was he?

A. International Dairy Supply Company.

Q. Now, are you familiar with the fact of how the can transactions from Western Can Company were handled after 1950?

A. I—no, I can't say that I do.

Q. Did you do anything with reference to the procurement of cans after 1950?

A. The dates would have to be verified.

Q. During what period of time did you do anything with reference to the procurement of cans?

A. During—

Q. By any of these companies?

A. 1948, 1949 and 1950.

Q. What about 1951?

A. I had nothing to do with procurement of cans in '51, to the best of my recollection. [78]

(Testimony of Marian O. Palmer.)

Q. Well now, did you start, then, working on the procurement of cans as soon as such cans became necessary under the army contract of International Dairy Supply Company?

Mr. Stacey H. Dobrzensky: That draws a lot of conclusions she would not be able to answer.

Mr. Resnik: She testified they started working on the cans in 1948. I want to find out when in 1948.

Mr. Stacey H. Dobrzensky: I agree you can ask, but you asked a lot of other things as to necessity and the like. I don't think that is a proper question.

The Court: Do you want to have the question read?

Mr. Resnik: Yes.

(The question was read by the reporter.)

Mr. Resnik: I am asking her for a point of time.

The Court: But I think Mr. Dobrzensky's point is that she has first to decide in her own mind when it became necessary.

Mr. Resnik: I will rephrase the question.

Q. (By Mr. Resnik): When in 1948 did you first undertake some activity with reference to the procurement of the cans? A. Late in 1948.

Q. How late in 1948? A. The last month.

Q. In December of 1948? [79]

A. I believe that's right.

Q. What did you do in December of 1948 with reference to these cans?

A. We issued orders upon receipt of a purchase order from Supply Company to Western Can Com-

(Testimony of Marian O. Palmer.)

pany covering the purchase of cans with shipment point designated on our order.

Q. When you say "we issued an order," did you physically type up the order?

A. I either typed up myself or it was typed by my assistant on my instructions.

Q. Who was your assistant?

A. I had several. One at about that time was named Mrs. Dillon.

Q. Who were the others?

A. Another was Miss—she was an English girl, and I am sorry, the name eludes me.

Q. Did you have any other but those two?

A. No.

Q. On whose payroll were they?

A. I believe Mrs. Dillon was International Dairy Supply Company's payroll.

Q. What about the English girl?

A. I believe she was on International Dairy Supply's payroll, but I would not be sure.

Q. Did Mrs.— [80]

A. May I correct myself? Mrs. Dillon was on the Association payroll, and the English girl, I can't recall.

Q. Now did they also type up the purchase orders that came in on the letterheads or billheads of International Dairy Supply Company?

A. No, they didn't.

Q. Who typed those up?

A. On Mr. Wickersham's instructions I pre-

(Testimony of Marian O. Palmer.)

sume they were typed at. I know they were typed in his department.

Q. Where was his department?

A. In another office.

Q. At 1106 Broadway? A. Yes.

Q. Where was your office?

A. At 1106 Broadway.

Q. And Mr. Turnbow was at 1106 Broadway?

A. Yes.

Q. Now, can you outline for us the mechanics that transpired in the routing of these various papers that are now in evidence as petitioner's exhibits No. 32, 33, particularly?

A. The purchase orders from International Dairy Supply Company were received by me.

Q. These are addressed to Continental Trading. You say were received by you. I would like you to go back, if you can, if there was a consistent pattern with reference to their [81] handling; I would like to know that. How did they come to you, through the mail, through messenger, did you pick them up?

A. These purchase orders are made out to Continental Trading Inc., Reno, Nevada, and were forwarded to me at 1106 Broadway, in Oakland.

Q. Now, you say forwarded to you. Did you get them in the mail? A. Yes.

Q. You mean that International Dairy Supply prepared these orders, mailed them to Reno, and then Reno mailed them back to you? A. Yes.

Q. That happened in every case? A. Yes.



(Testimony of Marian O. Palmer.)

Q. Now, did you receive any oral instructions with reference to the cans before you received any of the writings, more particularly petitioner's Exhibit 32?

A. Very likely there was some discussion. I know my orders came from Mr. Turnbow as to what I was to do when the orders were received.

Q. Prior to the receipt of the orders, petitioner's Exhibit 32, did anyone tell you that International Dairy Supply needed cans and the quantity they needed? A. Yes.

Q. Who told you that? [82]

A. The procurement department. Whether it was a clerk or Mr. Wickersham, I can't say now, of the Supply Company.

Q. Someone told you that they needed some cans, and what would you do then?

A. Find out how many they needed.

Q. And after you found out how many were needed, then what did you do?

A. Went to issue an order to Western Can Company on Continental Trading order heads.

Q. Do you know Mr. Woods at Western Can Company? A. Yes, I do.

Q. Do you know Mr. Almand of Western Can Company? A. No, I don't.

Q. Mr. Woods handled this type of can for Mr. Turnbow during 1948, 1949, 1950, did he not?

A. Yes.

Q. Did you call Mr. Woods and tell him you needed the cans?

(Testimony of Marian O. Palmer.)

A. I have often talked with Mr. Woods. I don't recall whether it was on specific order or not.

Q. Didn't first call him when you got the request for cans?      A. I did not.

Q. Now, I just wanted to ask you again, Miss Palmer, whether you are certain in your own mind that each of these [83] orders from International Dairy Supply, petitioner's Exhibit No. 32, came to you by mail from Reno?

A. To the best of my recollection, yes.

Q. Are you certain they weren't handed to you?

A. No.

Q. I want to direct your attention to the second order of petitioner's Exhibit No. 32, which is order No. 480-B, and is dated April 5, 1949, and is for 6,000 5-gallon cans and bears the signature of Mr. Wickersham and is addressed to Continental Trading, Inc., Reno, Nevada, and at the same time I want to direct your attention to the third sheet, purchase order No. 103, in petitioner's Exhibit No. 33, which is on the letterhead of Continental Trading, Inc. of Panama to Western Can Company, stating that the shipping dates should be April 8 to April 11 for the same cans that were ordered under date of April 5 from International Dairy Supply with shipping between April 8 and 11.

I ask you whether by looking at these two documents you still are of the view that the International Dairy Supply orders were first mailed through Reno and then remailed back to Oakland from Reno and to you.

(Testimony of Marian O. Palmer.)

A. I am quite sure these orders came in from Reno. It may be that verbal instructions were passed at the same time that the order itself was sent to Reno.

Q. That is, when we are talking about the orders sent to [84] Reno, you are talking about petitioner's Exhibit 32? A. The Supply Company.

Q. Do you know why the orders were sent to Reno and not handed across the hall?

A. That was the corporation's address.

Q. Do you know what offices the corporation had in Reno?

A. Yes. They were in the office of the Nevada Agency & Trust Company.

Q. Were you ever in those offices?

A. No.

Q. Now then, did you prepare petitioner's Exhibit 33, the purchase orders on Continental Trading, Inc. before you received the International Dairy Supply Company order?

A. Since they bear the same date, presumably I must have, or postdated my order to agree with that of Supply Company. I must admit my recollection is faulty in that way.

Q. Are you certain you didn't, or someone in your office, telephone over to Western Can Company for these cans even before petitioner's Exhibit 33 was prepared?

A. If it was, I didn't do it.

Q. Apparently then, you were not the only one

(Testimony of Marian O. Palmer.)

concerned with the procurement of cans necessary in connection with the army contract, were you?

A. No. I issued the orders of Continental Trading [85] Company covering their purchases of cans. I had nothing to do with the other procurement for Supply Company.

Q. After you prepared these orders, petitioner's Exhibit 33, what did you do with them?

A. The Continental Trading orders, do you mean?

Q. Yes.

A. Made out to Western Can Company?

Q. Yes.

A. They were mailed to Western Can Company in San Francisco.

Q. Looking at petitioner's Exhibit No. 33, can you tell me where you got the unit price for the cans that appear on it?

A. Is there a unit price shown on the purchase order of Supply Company?

Q. I will hand you Exhibit 32 and ask you to determine that.

A. I suppose this was the price agreed upon by the officers of Continental Trading, Mr. Turnbow and Western Can Company.

Q. Do you know what that price was? You said you supposed. Do you know? A. No.

Q. Do you know where you got the figure to put down there? [86]

A. From Mr. Turnbow.

Q. You mean every time a purchase order had

(Testimony of Marian O. Palmer.)

to be prepared you had to get all the information from Mr. Turnbow?

A. No. A contract for purchase at a certain price would be entered into for a certain period of time; when that time ended, the new price or perhaps a continuation of the old one.

Q. Do you know whether there was a contract between Western Can Company and International Dairy Supply Company for these cans?

A. Would you ask the question again?

Q. Will you reread the question, please, Mr. Reporter?

(The question was read by the reporter.)

The Witness: No, I don't.

Q. (By Mr. Resnik): Do you know whether there was a contract between Western Can Company and Continental Trading for these cans?

A. No, I don't.

Q. Do the files of Continental Can Company contain such a contract?

Mr. Milton W. Dobrzensky: You mean Continental Trading, not Continental Can.

Mr. Resnik: Thank you, Continental Trading.

The Witness: I am sorry, I don't know. [87]

Q. (By Mr. Resnik): Now, Miss Palmer, after the preparation of the documents comprising Exhibit 33, the orders on the letterheads of Continental Trading, addressed to Western Can, what was the next step that you did or took?

A. I received invoices from Western Can Com-



(Testimony of Marian O. Palmer.)

pany in the mail covering the shipment, indicating when the shipment had gone forward.

Q. Pardon me?

A. In compliance with Continental Trading's order, purchase order.

Q. Then Continental Trading's purchase order must have been forwarded in some manner to Western Can? A. Yes.

Q. How was that done?

A. It was mailed to Western Can. I believe I said that earlier.

Q. And then you received at 1106 Broadway the documents comprising Exhibit 34, the Western Can Company invoices? A. Yes, sir.

Q. What then did you do?

A. I checked with the procurement department of International Dairy Supply Company to make sure that the car had actually been received or had gone forward to its destination. On being sure that it had been properly routed, it was passed to the accounting department where it was paid. [88] I instructed—either made out the check myself or instructed an assistant to make out the check. It was duly signed by those authorized to sign; mailed to Western Can Company.

Q. Now, you say you had an accounting department at 1106 Broadway?

A. I was the accounting department.

Q. You? A. For Continental Trading.

Q. Were you the accounting department for International Dairy Association? A. Yes, I was.

(Testimony of Marian O. Palmer.)

Q. You were the accounting department for International Dairy?      A. No.

Q. They had their own accountant?

A. Yes.

Q. Who was he?      A. George A. Jones.

Q. Did you receive any salary from International Dairy Association acting as accounting department?      A. No.

Q. And, of course, you received no salary whatsoever from Continental Trade?      A. Correct.

Q. Now then, we are to the point now that a check was [89] prepared and sent to Western Can Company in compliance with their invoices which comprised petitioner's Exhibit 34. What was the next step?

A. We finished with the invoicing from Western Can. Is that correct?

Q. That's right.

A. Then an invoice was made on Continental Trading letter—or heading and issued to Supply Company for covering the shipment of the cans.

Q. Those are Exhibits 35. Who prepared those?

A. I either prepared them or they were prepared on my instructions.

Q. By whom, under your instructions?

A. An assistant.

Q. One particular assistant?

A. I think I have already said there were several during the period of time. The one I mentioned by name was Mrs. Dillon.

Q. Then what did you do with the invoice, peti-

(Testimony of Marian O. Palmer.)

titioner's Exhibit 35, that was prepared on the letter-head of Continental Trading?

A. Sent it to the accounting department of International Dairy Supply Company.

Q. Did you mail it to them?

A. No, I don't believe it was mailed. I think it was [90] collected with other mail by a mail clerk and distributed in that fashion.

Q. Now, I show you petitioner's Exhibit 35 and ask you where you received the information with reference to the unit price and other data appearing thereon.

A. I believe this is the price that appears on the Supply Company purchase order.

Q. That is petitioner's Exhibit 32?

A. 375.63 per thousand.

Q. As I understand your testimony, the figures that you put on or had put on petitioner's Exhibit 35 you took from petitioner's Exhibit 32?

A. Yes. There was a formula, however; it was a 5 per cent increase in the price of Western Can billing to Continental Trading.

Q. Who told you about that?

A. Well, it was part of my records and my—filed with filed instructions.

Q. Do you have a copy of the instructions that were issued you? A. No.

Q. Were they written instructions?

A. I think they were probably in my own handwriting, for my own memorandum purposes.

Q. They no longer exist? [91]

(Testimony of Marian O. Palmer.)

A. Not to my knowledge.

Q. Was it your determination that there should be a 5 per cent increase, or was it something that was told you?

A. Something that was told me.

Q. We are now to the point, Miss Palmer, of there having been prepared the invoices, petitioner's Exhibit 35, and your handing them to someone at 1106 Broadway. Do you know what happened after that with reference to these invoices, petitioner's Exhibit 35?

A. In the sense did I do it myself? No, I don't know from personal experience.

Q. What was the next occurrence in the parade of events of which you have knowledge?

A. I received——

Q. After the execution of petitioner's Exhibit 35?

A. I can't keep these exhibit numbers straight. That was the invoice of——

Q. That was the invoice on Continental Trading letterhead. Don't hesitate to ask for these at any time.

A. After these were delivered to the accounting department of Supply Company for checking and for verification, a check was prepared by Supply Company's accounting department and given to me, or handed to someone in my department, whereupon it was stamped for deposit and mailed to Continental Trading banking account. [92]

Q. Did the checks in payment of the invoice,

(Testimony of Marian O. Palmer.)

they were handed to you and were not mailed to Reno as were the orders that we previously talked about?      A. No.

Q. Then apparently upon receipt of these checks they, together with any other checks, were deposited to a bank account of Continental Trading?

A. Yes.

Q. Do you now know of the time it took for you to receive a check from International Dairy Supply Company after the preparation of petitioner's Exhibit 35?

A. Judging by the dates on this invoice that I hold in my hand, which is dated March the 31st, it is stamped paid April the 8th, 1949, by check No. 683.

Q. It was a fairly immediate transaction?

A. Yes, it was ten days.

Q. Did Continental Trading Company have a warehouse at Oakland?      A. No.

Q. Did it have any stock of cans?      A. No.

Q. Did it ever order cans for its own account?

A. No.

Q. Did you keep the accounting records of Continental Trading? [93]      A. No.

Q. Didn't you say you were the accounting department of Continental Trading?

A. What consisted of the accounting department in California, I was it.

Q. What was that?

A. Writing checks, verifying invoices, making



(Testimony of Marian O. Palmer.)

out statements to go to Continental Trading in Mexico.

Q. What was the nature of the statements that were sent to Continental Trading in Mexico?

A. They reflected the disbursements, the check numbers to whom paid, other details of accounting, and also my deposits made to the bank account.

Q. Were you familiar with the activities of Continental Trading in Mexico?      A. No.

Q. Were you familiar with any other activities of Continental Trading other than that relating to these cans under the army contract?

A. Can you be more specific than that?

Mr. Resnik: Will you read the question, please, Mr. Reporter?

(The question was read by the reporter.)

Mr. Milton W. Dobrzensky: You mean in the United States, of course, or do you? [94]

Mr. Resnik: Anywhere.

Mr. Stacey H. Dobrzensky: I will object to your question, Counsel, on the grounds it assumes a fact not in evidence, to-wit, that Continental Trading had a contract with the army. You said under the army contract.

Mr. Resnik: I am sorry. I am talking about the army contract of International Dairy Supply.

The Witness: What is the question now?

Mr. Resnik: Let me rephrase it.

Q. (By Mr. Resnik): Let me go back. Were you familiar with any of the activities of Continental Trading Company in Mexico?      A. No.

(Testimony of Marian O. Palmer.)

Q. Were you familiar with the fact that Continental Trading Company was the outgrowth of the consolidation of a fortune of Mr. Axel Wenner-Gren?

Mr. Stacey H. Dobrzensky: I object to that on the grounds it is a fact clearly not in evidence, and if it were a fact, it would be irrelevant and incompetent on the issue involved here.

Mr. Resnik: These are questions—this witness has come before us as one of the people familiar with the activities of Continental Trading.

Mr. Stacey H. Dobrzensky: Your question assumes one of those activities was— [95]

Mr. Resnik: It makes no difference. I can ask her whether she knows if Mr. Wenner-Gren took a rocket to the moon. If she doesn't know she will say so. This is cross examination.

The Court: Are you raising an objection?

Mr. Stacey H. Dobrzensky: I stated my objection originally, your Honor, on the grounds it assumed facts not at all in evidence; first, assume they were facts, they are not material to any issue here. I don't think it is proper cross examination to ask her a question if she knows things that may or may not have existed, stating as if they did.

The Court: Well now, I don't know how far you want that last statement of yours to go as being a ground of an objection, but it is not my impression this is proper cross. I mean, I think this goes beyond the scope of the direct.

Mr. Resnik: With reference to that, your Honor,

(Testimony of Marian O. Palmer.)

there are two points. First, I believe the witness came before us as one of the perhaps two witnesses who will tell us of Continental Trading.

The Court: She was asked questions dealing only with this matter of the procedure with reference to cans.

Mr. Resnik: I believe her testimony went beyond that. But be that as it may—

The Court: That was my recollection.

Mr. Resnik: It was my understanding with Mr. Dobrzensky, which I am certain he will recall, it was not [96] incorporated into the stipulation that any witness presented could be cross examined about matters in the stipulation, as though that witness were used as the vehicle to get the evidence in other ways—as your Honor sees, if we stipulate a case we are precluded from cross examination; there would never be any point in stipulating. However, we did stipulate on the basis that if we didn't all of this would have to come through witnesses, and then we would cross examine, and that was our understanding.

The Court: If you have such an understanding, Mr. Resnik, of course I am not going contrary to it.

Mr. Stacey H. Dobrzensky: I think, if the Court please, that we said that we agreed to produce Miss Palmer, to produce Mr. Turnbow, although Counsel wanted to have a subpoena issued. I don't recall an agreement that any particular witness we produced could be cross examined about any matter set forth in the stipulation, because a wit-

(Testimony of Marian O. Palmer.)

ness would not know all the things that encompass it. However, I distinctly did agree that certainly either party is free to call any witnesses. If Counsel wishes to call Miss Palmer as his witness, he can examine her as to matters that are relevant to the case. We are dealing with cross examination.

The Court: I am assuming that this is cross examination, and if it is, it just isn't so, Mr. Resnik, that you can cross examine a witness on anything in the stipulation. [97] Very frequently the matters are put in a stipulation for the purpose of doing away with the necessity of calling a witness.

Mr. Resnik: I am taken completely by surprise, and it may be a matter of misunderstanding, although I think it was not. We sought to expedite the consideration of the matter by having a comprehensive stipulation to avoid the necessity and the cumbersomeness of identification and the like. Now, I can't assume at this point that this would not have been the witness through whom any of these documents would come in. Perhaps if I wait until tomorrow morning, they will say I should have asked it of the witness here yesterday. I can only on the basis of the knowledge I have assume that I can ask this witness the question. If she has no knowledge, then I will have to await some witness who has, because undoubtedly the petitioner would have had to produce someone in court to get these documents into the court. Now, whether it is this witness or another I haven't been told, and on that basis we entered into this understand-

(Testimony of Marian O. Palmer.)

ing that we would expedite the consideration of the trial by having——

The Court: As I say, I am not going to go contrary to any understanding you have, but I want to have it perfectly clear that it doesn't follow automatically from the existence of a stipulation that you can cross examine a witness beyond the scope of the direct and, if necessary, you will have to base your stipulations on that theory by, if necessary, [98] examining the witness yourself and then insisting on putting in a stipulation what is brought out by that examination.

Mr. Resnik: Unfortunately we have proceeded to a certain point here. Henceforth, what the Court says is that we should not enter into stipulations and merely have them produce the living witnesses through whom the documents come in, so that a basis of cross examination is established.

The Court: Nothing of the kind. I say if there is anything you want to get into a stipulation that wouldn't have been produced from a witness through whom this comes in, you put it in the stipulation on your side, but that is no basis for not stipulating. I have to do the best I can. Mr. Dobrzensky, as I understand it, is saying that he would produce the witness, but if you want to ask the questions you have to make him your witness. I must say that that is my impression, that that was the statement he made when we discussed this case in chambers, that he would produce Mr. Turnbow so as not to prevent you from bringing things



(Testimony of Marian O. Palmer.)

out from a live witness, but he didn't say he was going to produce him and let you cross examine him as though he were his witness; so that the best I can do on the basis of what I understand now, and my recollection of the testimony, is to rule that it is——

Mr. Resnik: Before your Honor rules, may I be heard further? [99]

The Court: Yes.

Mr. Resnik: If you recall, there was a line of questioning put to Miss Palmer with reference to her knowledge and familiarity with the activities of Continental Trading. She answered at some length with reference to that, talking of some activities that she overheard with reference to conversations with the Baroness Franchetti, which is in the record, and with reference to the sale of milk to underprivileged people. That is in the record as part of her direct examination. That far transcends her examination with reference to petitioner's Exhibit 32.

The Court: That is correct, and I recall it now.

Mr. Resnik: With reference to that, I can test her knowledge of these activities and how far it goes.

Mr. Milton W. Dobrzensky: What Mr. Resnik and I talked about was this: according to my best recollection——

The Court: This goes to a different question.

Mr. Milton W. Dobrzensky: This goes to this question of our stipulation.

(Testimony of Marian O. Palmer.)

The Court: No, no. This goes to the question of whether this is beyond the scope of the direct.

Mr. Milton W. Dobrzensky: Very good.

The Court: And I think that is correct. I think enough was brought out in connection with other matters which I had not recalled, so that I think that is correct and I [100] will overrule the objection.

Now, will you rephrase the question? I prefer not to have the reporter go all through his notes.

Mr. Resnik: Let me have a moment—yes.

Q. (By Mr. Resnik): When did you first learn of the existence of a company known as Continental Trading, Inc.?

A. Mr. Turnbow told me of it.

Q. When?

A. It must have been—I cannot be sure. It must have been either the latter part of 1947 or the early part of 1948.

Q. What was the name of the company that he used, if you recall?

A. It was Continental Trading, Incorporated.

Q. Did you ever meet Mr. Axel Wenner-Gren?

A. Yes.

Q. Did you have any discussions with him with reference to Continental Trading? A. No.

Q. Did you know who owned the stock of Continental Trading? A. No.

Q. You didn't own any stock? A. I?

Q. Yes. [101] A. No.

Q. Nor did Mr. Turnbow? A. No.

(Testimony of Marian O. Palmer.)

Q. Do you know who the officers were of Continental Trading, Inc.?

A. Mr. Turnbow was president. I believe a Mr. Franklin A. Schultze was treasurer.

Q. Did you know any of the people who ran the company in Mexico? A. I knew Mr. Schultze.

Q. Now, you testified that you were the accounting department of Continental Trading here, did you not? A. Yes.

Q. Did you prepare the tax returns of Continental Trading which are in evidence as Exhibits A, B and C, for the years—such returns being for the years 1948, 1949 and 1950?

A. May I see them?

I did not prepare these.

Q. Do you know who prepared them?

A. Mr. Schultze, I believe. I think that is in here.

Q. Do you know apart from what is said in the return? Do you have any knowledge of your own?

A. No.

Q. You are familiar with the fact, are you not, that International Dairy Supply continued, and apparently still [102] continues, to supply milk pursuant to which armed forces contract to the Far East? A. Yes.

Q. It did so provide the milk after 1950?

A. Yes.

Q. In connection with its execution of the contract, it needed cans, did it not? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Did it continue to buy those cans from Western Can?

A. It must have. I mean, it must have bought cans.

Q. What part did you play in that phase, in the acquisition of cans after 1950? A. None.

Q. Was the name of Continental Trading at any time removed from the door at 1106 Broadway? A. Yes.

Q. It is not there now? A. No.

Q. When was it removed, if you know?

A. Early in 1951, I am quite sure.

Q. Did you ever make inquiry as to what happened to the receipt of orders for cans for International Dairy Supply that you had been previously handling? A. No. [103]

Mr. Milton W. Dobrzensky: Are you referring to these or others, Mr. Resnik?

Mr. Resnik: Referring to the same type.

Mr. Milton W. Dobrzensky: You mean additional to these?

Mr. Resnik: Yes.

The Witness: No, I don't.

Q. (By Mr. Resnik): Were you ever told by Mr. Turnbow or anyone else that International Dairy Supply would not be mailing orders over to Continental Trading?

A. Continental Trading withdrew from the United States, it is my understanding. They no longer existed in the United States.

Q. And at that time, then, you no longer partici-

(Testimony of Marian O. Palmer.)

pated in the execution of documents for the acquisition of cans, is that correct?

A. That's correct.

Q. Were you in the employ of Mr. Turnbow when he was at the University of California?

A. Yes, I was.

Q. During what years did that take place?

A. 1925—1925, 1926 and 'til June the 1st of 1927.

Q. Did you ever make a trip to Mexico in connection with any of Mr. Turnbow's activities? [104]

A. No.

Q. Were any books of account of Continental Trading kept by you?           A. No.

Q. Were any books of accounting of Continental Trading kept in the United States?

A. Not to my knowledge.

Q. No books were kept at the box in Reno, Nevada?           A. No.

The Court: We will take a ten minute recess.

(Short recess.)

Q. (By Mr. Resnik): Miss Palmer, I show you petitioner's Exhibit No. 36. Did you receive those documents at 1106 Broadway?           A. Yes.

Q. Do you know what those documents purport to be?

A. This is a credit advice from the Bank of America addressed to Continental Trading, Inc. at 1106 Broadway, attention Mr. Grover D. Turnbow.

Q. Do you know where the Bank of America got the money to credit you?



(Testimony of Marian O. Palmer.)

A. Yes. They sold some securities of the corporation.

Q. Are you familiar with how the corporation acquired those securities that were sold?

A. Yes, they bought them. [105]

Q. From whom? A. Mr. Wenner-Gren.

Q. I want to refer again to petitioner's Exhibit No. 32—

Mr. Milton W. Dobrzensky: What are those, Mr. Resnik?

Mr. Resnik: They are the International Dairy Supply export purchase orders.

Mr. Milton W. Dobrzensky: Addressed to Continental?

Mr. Resnik: Addressed to Continental Trading.

Q. (By Mr. Resnik): Are you familiar with the terms and conditions that appear on the back of those purchase orders?

A. Only in a very superficial way.

Q. Were you advised by anyone, or did you on your own knowledge, seek to comply with those conditions when International Dairy Supply was billed for the cans? A. Yes.

Q. Where in Exhibit 35, Continental Trading invoices, International Dairy Supply, do you indicate that there has been compliance with the conditions appearing on Exhibit 32?

Mr. Stacey H. Dobrzensky: Will you read the question again, please?

(The question was read by the reporter.)

Mr. Stacey H. Dobrzensky: I will object to that,

(Testimony of Marian O. Palmer.)

your Honor, on the ground I know of no rule that requires any [106] order of transmittal or invoice to state that you have complied. The fact of compliance is a matter to be determined by the recipient and to take any steps if there is any objection. The conditions that are a part of the order either are complied with or they are not. There is nothing to require an affirmative statement that they are, and the question assumes the state of the law that I think does not exist and certainly is not a matter of proper cross examination.

Mr. Resnik: May I hand to your Honor petitioner's Exhibit 32 and direct your attention particularly to condition No. 2 which specifies that the invoice shall contain the quoted language.

The Court: In any event, I don't see that the question is objectionable.

Mr. Resnik: No.

The Court: Overruled.

Mr. Resnik: Will you please read the question to the witness, Mr. Reporter?

(The question was reread by the reporter.)

The Witness: I see nothing on here to indicate that they have or have not complied.

Q. (By Mr. Resnik): Are you familiar with a company known as Lecheria Nacional S.A.?

A. Yes. [107]

Q. Was that another company in which Mr. Turnbow had an interest?

A. That was a company that he engineered a plant for in Mexico City. It was the first milk—

(Testimony of Marian O. Palmer.)

whole milk recombined plant, to my knowledge, in the world.

Q. I wish to direct your attention to petitioner's Exhibit 33, the purchase orders of Continental Trading addressed to Western Can Company, and I want to direct your attention particularly to purchase order No. 162, dated July 22, 1950.

Did you receive from International Dairy Supply a request for the cans covered by that order as you did in the others prior to Exhibit 32?

A. May I see the purchase order?

Mr. Resnik: I will withdraw the question and have no further questions of the witness at this time.

Mr. Stacey H. Dobrzensky: I have no questions to ask, your Honor.

(Witness excused.)

Mr. Stacey H. Dobrzensky: At this point, I would call a witness who is at this moment, I am sure, on an airplane, as a part of our case. Your Honor mentioned, I think, at the outset this morning whether or not some part of the Government's case could go forward. That would be in Mr. Resnik's hands, of course, but our only other witness will be Mr. Turnbow whom [108] we would start off with in the morning, so the remaining portion of the day's time is now before us, whether Counsel has anything—

The Court: Does Mr. Resnik know in general what it is you expect to bring out from Mr. Turnbow?

Mr. Resnik: No, I don't know.

Mr. Stacey H. Dobrzensky: I would say that from conversations in Mr. Resnik's office, I can recall some lengthy statements of some of the purposes of this corporation, that sort of thing—the activities, I should say, that he will recall when he hears testimony on the subject. It will not be a lengthy examination, and I don't think there is anything that will surprise him, in other words.

The Court: The only reason I ask that is because it occurred to me it might make a difference in a decision as to whether the respondent can safely go ahead with any case he may have if you could be pretty specific.

Mr. Resnik: If your Honor please, there is little I can do this afternoon in any event, whether I am familiarized with the testimony or not. What I can do, irrespective of what they might say, is ask Mr. Dobrzensky to join with me in stipulating some facts that would give background to some of the documents here which have been offered, by an executive vice-president of a bank whom we can produce if he so desires.

Mr. Stacey H. Dobrzensky: Perhaps we can do that. [109]

The Court: I was going to say maybe the best use of the time would be you gentlemen to back to your office at one or the other of you and try to put that in writing.

Mr. Resnik: We can state it very simply.

The Court: It would be preferable to get it in writing if you can because you know as well as I

do, Mr. Resnik, that a statement by one counsel isn't necessarily concurred in by the other, and then you have to fight back and forth to get it in order. Since there is time left, I think that would be the way you could use the time the best.

Off the record.

(Discussion off the record.)

The Court: Back on the record again. I take it that there is nothing that you think we could profitably do here now. Could you give me some idea of what your estimate of time will be for tomorrow?

Mr. Resnik: I would think, barring unforeseen circumstances, we should finish in the morning.

Mr. Stacey H. Dobrzensky: With Mr. Turnbow I have about eight questions, and they relate primarily to his activities in negotiating these various plans for the various parts of the world, and part are related to that and should take a very short time, twenty minutes or thirty minutes, at the outset, and that will be the petitioner's case.

The Court: I think that comes close enough. In [110] other words, you think that with that and your cross examination and possibly even any re-direct that we should be through by 12:30 or so?

Mr. Resnik: I think so.

Mr. Stacey H. Dobrzensky: I would think so.

The Court: Thank you.

We will take a recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:30 p.m., a recess was taken until 10:00 a.m. of the next day.) [111]



August 31, 1956

Proceedings

The Clerk: We will proceed with Docket No. 55212, Continental Trading, Inc.

Mr. Resnik: At this time, your Honor, I would like to file a second supplemental stipulation of facts. I filed an original and one copy. There is no certificate attached.

The Court: The stipulation will be received.

Mr. Resnik: By virtue of the filing of stipulation of facts, it becomes unnecessary to call as a witness Mr. Russell G. Smith who responded to a subpoena of this Court, and I would ask he be released from his subpoena.

The Court: Is Mr. Smith here? I take it there is no objection.

Mr. Stacey H. Dobrzensky: None.

The Court: You are excused.

Mr. Milton W. Dobrzensky: Mr. Turnbow, will you take the stand, please, right up here?

Whereupon,

GROVER D. TURNBOW

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name and address for the record?

The Witness: Grover D. Turnbow—T-u-r-n-b-o-w—425 Battery Street, San Francisco. [114]

Direct Examination

Q. (By Mr. Stacey H. Dobrzensky): Mr. Turn-

(Testimony of Grover D. Turnbow.)

bow, I will show you Petitioner's Exhibit No. 6, which is a promissory note that bears the type-written name in the signature place of Continental Trading, Inc., and ask you if that is your signature that appears below?      A. Yes, sir.

Mr. Resnik: Stipulated.

The Witness: It is.

Q. (By Mr. Stacey H. Dobrzensky): And with respect to the note of August the 6th, 1948, Bank of America, is that your signature?      A. Yes.

Q. And with respect to a note dated September 8, 1949, I ask you if that is your signature?

A. Yes, sir.

Q. With respect to each of these notes and loans, were those negotiated by you as president of Continental Trading, Inc.?      A. Yes, sir, they were.

Q. With whom did you negotiate those loans, Mr. Turnbow?

A. The three you showed me there, the Bank of America; Mr. Smith, Russell Smith, mainly.

Q. With respect to the Central Hanover loan, who negotiated that? [115]

A. I negotiated the loan with the Hanover Bank and also had the secretary of Continental Trading, Mr. Schultze, who was in New York at the time—

Mr. Resnik: If your Honor please, I will ask counsel to specify the date there. There will be some confusion because there may be more than one loan from Central Hanover Bank.

Mr. Milton W. Dobrzensky: The only one he is referring to is the one referred to in the stipula-

(Testimony of Grover D. Turnbow.)

tion, but we will give you the date of it. It is the loan referred to, Mr. Resnik, on page 13, paragraph 1, on January 3rd, 1950; petitioner borrowed from Central Hanover Bank and Trust Company of New York the principal sum of \$2,000,000 evidencing the same for the note of December 30, 1949.

Mr. Resnik: Thank you.

Q. (By Mr. Stacey H. Dobrzensky): And the negotiations you referred to as taking place in New York with Central Hanover were at or about that date?

A. To the best of my knowledge, without refreshing my memory or seeing the documents.

Q. During the years 1948, 1949 and 1950 you were the president of Continental Trading at that time, were you not, during those years?

A. That's approximately so.

Q. Where did you maintain your offices during those three years? [116]

A. 1106 Broadway, Oakland, California.

Q. Did you maintain your office as president of Continental at that same location?

A. Yes, sir.

Q. During the three years of 1948, 1949 and 1950 what was the principal activity in which you engaged as president of Continental; that is, during those years?

A. Well, it was tied up with an overall program of which—of having in mind the establishment of plants in foreign countries, and Continental Trad-

(Testimony of Grover D. Turnbow.)

ing being the financial company that was to underwrite these deals—and, as I say, deals—plants in these various countries.

Q. Those were milk plants, is that correct?

A. Yes, recombined milk plants.

Q. What were some of the countries that you dealt with in those cases, if you recall?

A. Oh, Abyssinia, Peru, Venezuela, Panama, Israel, Italy—considerable time spent in Italy—Turkey, India, Philippine Islands. Many, many countries we visited and worked with.

Q. Taking, for example, Italy, that you just mentioned, would you state over what period of time negotiations took place with people from Italy, or involving a plant at Italy?

A. Length of time?

Q. By that, I mean was it part of the year 1948 or 1949?

A. It was quite a substantial length of time because the [117] matter—working out a deal with the Italian Government and our own government, because it had to be done at governmental levels in the first place to get a permit. Next the product had to be released from the United States and shipped to Italy. We had to agree to sell it. We worked with a group in Italy that had to do with the feeding of people. We were trying to get away from the give-away deal we had been doing in our country and trying to put it on a basis of making itself supporting, and we had a deal worked out with the church over there that—whereby they

(Testimony of Grover D. Turnbow.)

would take so many thousand quarts a day and would give them to needy people, and we would charge a little extra for the balance of the milk that was sold to people who could pay for it to help feed these people that were underfed. And the project was completed by—and agreed to by everyone, except one detail; and that is that we could sell our milk, but we had to take lira. That is all the Italian people had, but I had no way of getting lira back into dollars to buy more product, so the net result would have been converting all of our dollars to lira, and that's just in the last year or so. If I may mention it, President Eisenhower has been helpful in getting this thing straightened out so now that we can use—where we have the approval, and the approval isn't hard to get, but where we have the approval and complete the job on a private enterprise, which our economy is based—can now function in these foreign countries and can—and they will accept the form [118] of currency, whether it be rubles, shekels, or Hong Kong dollars or yen, whatever it happens to be, we now exchange that on a rate that the United States Government will approve of in getting back dollars to do more business and sell some of the surplus products we produced in these United States.

Q. Approximately when was it that you ran into this problem, speaking now of the Italian deal? Do you recall which year, for example?

A. I would have to refresh my memory, sir, on



(Testimony of Grover D. Turnbow.)

that. I wouldn't want to give you a statement. It was something back, '48 or '9, but I wouldn't want to be held to that.

Q. These negotiations with the people from Italy, did they take place in Italy or in the United States or where?

A. Both. I was in Italy several times. I was doing work with the United Nations. In fact I—just a group of buildings, 40 plants in Europe, for the United Nations, both behind the Iron Curtain and this side, and in my studies of that I saw this need of food and I was—I got into the United Nations because I suggested we work out a deal that let them carry their own load instead of continuing to use the taxpayers' money, and that is how part of this came along. And I visited with people in Italy many times, and I guess they made two trips to this country—two of the principals to this country.

I called upon the heads of the Catholic church; I have called upon the heads of the government, of the people, [119] and everybody was agreed, for the reason I explained to you.

Q. Now, you mentioned a considerable number of countries with whom you discussed or dealt with with respect to possibilities of establishing plants. In those cases did negotiations take place in your office in Oakland, or elsewhere?

A. Part of the time, part of the time; but some of them in Oakland, a good many of them in Oakland. As a matter of fact, I suppose in the United

(Testimony of Grover D. Turnbow.)

States most of them were in Oakland, but many times we went to these foreign countries and negotiated right on the ground.

Q. Now——

A. At their request, as a rule. Generally, you will find that some requests, a letter or some telephone—something, you will find requests for many of these places for negotiations.

Mr. Resnik: May I request that counsel ask the witness to state the period of time that we are talking about. We have covered a vast number of years.

Mr. Stacey H. Dobrzensky: I originally asked questions with respect to the years 1948, 1949 and 1950 and directed the rest of my questions to those years.

The Witness: How accurate are you on those dates? You want it on the morning of October 10, or do you want it sometime in those years? If you want those years, that covers these negotiations, if that answers your question. [120]

Q. (By Mr. Stacey H. Dobrzensky): As a matter of fact, during those three years almost all the time you were talking to someone about various one or the other of these countries and working out arrangements?

A. It is a great idea if we can get it all finished.

Q. You mentioned in respect to the Italy deal that the inconvertibility of the lira was the stumbling block. Was that true of the other countries as well?

(Testimony of Grover D. Turnbow.)

A. Yes. If you look back in our monetary system and just what happened here, you will find that money tightened up from the time we started. The matter of conversion and the stability of currencies in foreign countries was changing. Take Mexico. The peso went from, what, 2.60 when Mr. Roosevelt came in to about 11.20 or 11.80 sometimes now, and it has been fluctuating in between. Unless you can get a stable currency there is no way you can do business.

And you see—you repeat your question. I only think I partly answered it. Would you repeat your question again?

Q. Whether or not the inconvertibility that was a problem in Italy was also a problem with the other countries?

A. There has been no plan set up to convert, and Allen Sproul was the president of Federal Reserve and I knew him quite well. He assisted in trying to get the high levels to adopt a method of exchange. In fact, we prepared a plan for exchange, and you will find a little of it right in the PL—Public Law [121] 480 that was only passed a year ago. I think it moved slowly. It is like that in these things.

Q. I take it that none of these plans that you worked on during the years 1948, 1949 and 1950 materialized because of its inconvertibility?

A. That's correct. Without that you can't make it work at all.

(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: I have no further questions. You may cross examine.

Cross Examination

Q. (By Mr. Resnik): When did you open your first plant under this plan of recombining milk in foreign countries?

A. In reference to Continental?

Q. In reference to your activities?

A. Well, am I—I can—I don't know.

Mr. Milton W. Dobrzensky: The witness has testified, your Honor, that none of these plans that he negotiated, none of these deals came to fruition, and the question is when he opened the first plant that was never opened. That is what was puzzling the witness.

The Court: This is cross examination, Mr. Dobrzensky. If you feel your witness doesn't know the facts, that you have to testify for him, of course, I will have to take that into consideration.

Mr. Milton W. Dobrzensky: I withdraw the statement, your Honor.

The Court: Did you get an answer?

Mr. Resnik: We have no answer, your Honor.

The Witness: Will you repeat your question?

Mr. Resnik: Mr. Reporter, will you read the question?

(Question and answer read by the reporter.)

The Witness: I think that's correct, if you are asking me about Continental.

Q. (By Mr. Resnik): No, I am——

(Testimony of Grover D. Turnbow.)

A. As an individual?

Q. When you, as an individual, or through any of your corporate enterprises.

A. Oh, oh; as an individual. I operated the first plant in—let's see, November, '46, in Mexico.

Q. Was that Lecheria Nacional?

A. Lecheria Nacional, si senior.

Q. Thank you. Then did you open any in 1947?

A. I think we extended the Lecheria Nacional and another plant, Lecheria Sanataria, in Mexico. And following that, if I may add, I think we put up the Moderno Dairy. These are all that I recall during the period I had anything to do with it.

Q. Those were in Mexico? A. Si. [123]

Q. And they were your activities through your company, International Dairy Supply Company?

A. No, nothing to do with it at all. No relationship at all.

Q. Were you acting as an individual in those enterprises?

A. As a consultant. I went down there as a consultant at the request of President Aleman. He was at that time not president and expected to be, and his judgment was sound. He later ended up as president.

Q. There came a point of time when you became president of International Dairy Supply Company and its sole owner? A. That's later.

Q. When did that occur?

A. Oh, that was in—let's see. That was in July of '48, and all of the work that I did that I just



(Testimony of Grover D. Turnbow.)

mentioned here was all done prior to that, and I had no further relationship with Mexico after that.

Q. Then there was also formed and you became a stockholder in a company known as International Dairy Association? A. That's right.

Q. There was also formed a company known as International Dairy Engineering Company?

A. That came later. I operated it. I operated the engineering end of it as D.B.A., doing business as dairying engineer. There was no corporate at that time. [124]

Q. In 1948 and 1949 and part of 1950—

A. Well, that is—at that date, yes, back when I did the engineering work.

Q. Now, you stated that at present there are some plants in foreign countries other than Mexico which are recombining milk? A. Yes.

Q. When were they established?

A. When what?

Q. When were they established?

A. Well, let's see. General MacArthur asked we make the survey in 1947, I believe. I don't want to be held to the exact dates. I can get them for you exactly if you want them. About '47, and a survey was made, and I entered into an agreement. We all bid on it by negotiations, and I was awarded the contract and the government wanted me to make it a corporation.

Q. And that was—

A. That was the International Dairy Supply

(Testimony of Grover D. Turnbow.)

Company, and that was the plant that other people thought they would go in on. When it got down to the final deal there was—I went in on it.

Q. International Dairy Supply Company had the contract to supply milk to the Far East for the armed forces?

A. I had it personally, and before we finally closed it, why, they thought I should incorporate, put it into a corporation, [125] so we put it into a corporation and—I said I did it. I should have included the Bank of America.

Q. Then in connection with the fulfillment of that contract, it was necessary for you to get ingredients in this country and ship them to these foreign countries?

A. Read his question again, will you please? Or you state it over.

Q. I will be glad to.

In connection with your fulfillment; that is, International Dairy Supply's fulfillment of the contract in the Far East, it was necessary for you to obtain raw materials and other ingredients in this country and ship them overseas?

A. That's correct.

Q. And they were shipped overseas in cans?

A. That's correct. The contract called for that. The Buy American Clause required I get the products in the United States and the specifications called for cans.

Q. And those cans were ordered from Western Can Company here in San Francisco?

(Testimony of Grover D. Turnbow.)

A. Yes, that's correct.

Q. Now, then, after——

A. I didn't say Supply Company ordered from Western Can. If I got your point, you aren't asking me who bought them. You said I—you mean under my direction? That is what you mean, is it?

The Court: Let's have the question read.

(The question was read by the reporter.)

Mr. Resnik: I don't think there is any confusion in the record on the point.

The Court: There shouldn't be.

Q. (By Mr. Resnik): Now, after the erection of the plant in the Far East, I gather that no plants were erected in any other country during the years 1948, 1949 and 1950?

A. Not to my knowledge, which I had anything to do with.

Q. That is all we are asking you, matters within your own knowledge.

A. You aren't referring to the ones the United Nations built and paid for, are you?

Q. No, no.

A. I see. All right. I did design and engineer and supervise the construction, but I had nothing in it, and it is run by the people in those countries.

Q. Now, when after 1950 was a plant erected in which you or your enterprises had an interest?

A. When?

Q. Yes.

A. 1950. I will have to kind of take you over the hurdles to bring you up to date. We built five plants

(Testimony of Grover D. Turnbow.)

weeks if everything goes well, in cooperation with the United States Government and PL 480, and our own capital.

Q. When you say "our own capital" whose capital is it?

A. Foremost Dairies capital.

Q. Foremost Dairy?

A. Yes. And it's separate from Supply Company. It is called Foremost Dairies of Bangkok, Ltd. I said some local capital in Thailand. There is another in Formosa that will be opened by the first of December. That's Foremost Dairies of Taiwan. That will be opened along in the first of December, selling American dairy surplus products that taxpayers are now holding in the warehouses here, and we sell them for money, and that takes it off the taxpayers' role, and feeding people.

I have a little theory that as long as you have as many hungry people in the United States you will never have peace until you have fewer—you are going to have fewer before you have peace, and I am a bit proud of being an American, sir.

Do you want more about plants?

Q. As I gather, these are plants that are being erected in connection with the operations of Foremost Dairies?

A. That's right, that's right; and we are building one in [130] Athens, Greece that will be opened in a couple or three weeks in Athens, Greece. I think there are two in Turkey having to do with the—this isn't classified, so it is all right. United

(Testimony of Grover D. Turnbow.)

States Air Force—in fact, the one in Athens, Greece is connected with the United States Air Force. Some of the material I can't give you, but I can give you that much, I think, without divulging anything I shouldn't.

Q. Getting back to the years 1948, 1949 and 1950, when you say that some plan was devised or conceived for the erection of plants in foreign countries with various interests joining together, I gather that Continental Trading was to be a participant in that in some way?

A. Continental Trading—I have nothing to do with Continental Trading except I got these people that owned it—I sold them on an idea, at least I thought I had, to be the financial house to make it to get the money to build these—to carry the finances in to do these dairy jobs in foreign countries. They had nothing to do with the operations of milk plants, they had nothing to do, but were simply a financial house only. They had money and—some money, and I tried to make that available for the purpose of financing these various dairy companies. Nothing to do with Supply Company, but with these other operations, International Dairy Association, to be more specific.

Q. There never came any time that you had to make any [131] demand upon Continental Trading for its funds, because you never developed any plant, isn't that correct?

A. They bought—yes, I made demands on them. I asked them if they would—being president, and



(Testimony of Grover D. Turnbow.)

the free enterprise system and what seemed to be good business in getting this overall job done, I asked them to — I took it up with them, and they told me it would be all right to use them to supply cans and we bought cans. We had to buy them for other plants, if we had other plants, and I bought the cans from Continental Trading.

Q. Did Continental Trading have a warehouse of cans that you would order from?

A. No. That was handled—no, they—Continental Trading bought their cans from Western Can Company, and was handled by my secretary. She handled it. It was a simple matter. Send the order for the cans; there was only two types of cans, so there was no—simple job.

Q. It has been stipulated that International Dairy Supply in 1948 ordered cans directly from Western Can Company. Are you familiar with that? In connection with these orders in connection with the fulfillment of the Army contract?

A. I don't recall it. It could have been. I don't recall it happening because they could have been the deal hadn't been completed with Continental Trading so that they would participate as I have outlined to you. I am not saying [132] yes or no. I would have to verify that.

Q. Let me ask you this: How did International Dairy Supply get its cans after 1950?

A. After 1950 — Continental Can went out of business did it?

Q. Continental Trading?

(Testimony of Grover D. Turnbow.)

A. Trading, I meant. In 1950—I think that was the date, and 1950, and the contract—in the Far East it was a short—in fact, it reached the end of its period, its first period since it had been renewed, and they went out of business and I think Continental—I don't mean Continental; I mean Supply Company bought cans, I think, directly from Western. Now that is handled by my procurement. I can get the exact information.

Q. Did International Dairy Supply, or did you, have a contract with Continental Trading for the acquisition of cans?

A. I don't know whether it was a written contract or whether it was an oral contract, an agreement. I will have to look at it.

Q. Did you bring the records that were requested of you in response to the subpoena?

Mr. Stacey H. Dobrzensky: I think, counsel, we have the records.

Mr. Resnik: Then I would ask you to produce, if there is in existence, such a written contract between International [133] Dairy Supply Company and Continental Trading.

Mr. Milton W. Dobrzensky: There is no such contract within any of the files that were supplied to us.

The Witness: I don't know of any, I can tell you that. I told you I would have to look it up to find out.

Q. (By Mr. Resnik): Well, now, didn't there come a point of time in 1951 when you arranged

(Testimony of Grover D. Turnbow.)

some sort of a settlement with Mr. Axel Wenner-Gren and received a substantial amount of money from him?

A. '51—substantial amount of money from him. I will tell you what you can find. You can find—if I did, it is in my tax report, and you have access to it.

Q. I am asking you.

A. I got no money except what I have got—

Mr. Resnik: I will ask the Court to instruct the witness to please answer the question.

The Witness: I can't answer the question correctly, but I will get it for you, sir. It is in the tax report, and I will get the tax report.

The Court: Well, are you saying that you don't remember?

The Witness: Yes, sir; other than to say my money I got, I know it's reported in my tax report.

Q. (By Mr. Resnik): After Continental Trading Company left the country, in early 1951, didn't you have some further negotiations personally with Mr. Axel Wenner-Gren?

A. Don't think I have seen Axel since that time.

Q. Didn't you receive from him the sum in excess of \$50,000 after that time?

A. After that time?

Q. After Continental Trading left the country?

A. I will get that information. I don't recall, sir. I will get the information for that, too. Unfortunately I have quite a few activities, and I can't keep all these in my mind.

(Testimony of Grover D. Turnbow.)

Q. With whom did you discuss the question of the can transactions that you said were engaged in between International Dairy Supply and Continental Trading?

A. With Axel Wenner-Gren, probably.

Q. When did that take place?

A. Prior to buying any cans.

Q. Was he in the country at that time?

A. No, I imagine he was in Mexico.

Q. Did you make a trip to Mexico?

A. I have been to Mexico a hundred times, and I can't tell you which one of those trips it happened to be on.

Q. In connection with your travels on behalf of [135] Continental Trading, were you reimbursed by that company for your travels?

A. I received the salary, and I think I got back my traveling expenses. I usually do. I intended to, if I didn't.

Q. I am not asking you to tell us. I am asking whether you know if you got paid for your travel on behalf of that company?

A. Out of pocket expenses, why, sure. That is standard procedure. I suppose I did, and I don't think he owes me any money.

Q. Can you explain to us why International Dairy Supply, after it had engaged in the operation of acquiring cans directly from Western Can Company, then sought to introduce Continental Trading into the picture?

A. Why, I thought it was a free country, pri-

(Testimony of Grover D. Turnbow.)

vate free enterprise, and I don't think there is any law that tells me to buy from you or you or you. There is nothing about that, so undoubtedly it was a good business decision, in which I probably made the decision, with their approval, to buy the cans. I am sure they would take the approval because I think they got five per cent *market*, which is a very small amount of money. We tied their money up, see.

Q. How much money of theirs did you tie up on these can transactions?

A. I don't know. What is a car of cans worth?

Q. Why don't you tell me?

A. I don't know. I can get it, though.

Q. Weren't most of those invoices for cans in the amounts of \$2000 or thereabouts?

A. Have you got a copy? I can look at it and tell you.

The Court: You are showing the witness what, please?

Q. (By Mr. Resnik): I am showing the witness Petitioner's Exhibit 34.

A. Yes, this roughly—this is a regular invoice, Western Can Company.

Q. They were about \$2000.

A. How much.

Q. About \$2000.

A. It says \$2000 here, but you say three. Where do you get three?

Q. I said two.

A. I misunderstood you. That's right.



(Testimony of Grover D. Turnbow.)

Q. And upon receipt of the invoice Continental Trading paid for it, you say?

A. I am sure they did, or Western Can would never have sold the cans.

Q. Didn't immediately thereafter International Dairy Supply send its check for payment of it?

A. I suppose they did.

Q. How much money was tied up for how long a period in [137] connection with the transactions?

A. I don't know. Get the checks and you will find out. I can't tell you how much is tied up here. Look at the bill. You got the check in your hand.

Q. Mr. Turnbow, let's assume the picture as you say it happened, that pursuant to requests from International Dairy Supply for cans Continental Trading calls Western Can Company and orders about \$2000 worth of cans. Then the cans are shipped, and Western Can Company sends over an invoice for \$2000 to be paid, and that is paid by a check of Continental Trading Company. Now, immediately thereafter didn't Continental Trading Company receive a check in like amount from International Dairy Supply Company and in connection therewith, I show you Petitioner's Exhibit 35.

A. So what? Nothing wrong about that.

Q. No, I am not saying anything is wrong.

A. I agree with those facts.

Q. Do you mean to tell the Court this transaction was engaged in because you wanted to tie up \$2000 for a period of about three days?

(Testimony of Grover D. Turnbow.)

A. No, I didn't say that. I said——

Q. If the facts so establish, would you still maintain that this transaction was entered into because you wanted the use of Continental funds?

A. If for no other reason, sir, if for no other reason, [138] I have a right as a private citizen doing business under the free enterprise system, to buy the cans wherever I want to buy, for whatever price I want to pay. If I lose money, there is nothing wrong about it. I have done nothing any businessman hasn't done. I have got that right of decision—I better add “yet” on to that thing.

Q. Did you think it was good business to pay five per cent more for cans and also the additional costs of your secretary and other office help in connection therewith?

A. I must have or I wouldn't have done it.

Q. I am asking you; do you know?

A. I must have or I wouldn't have done it, and let me tell you probably Supply Company couldn't have bought those cans direct because Continental Can were not in business. That may have some bearing on it, but whether it was or not, there is nothing to prevent me from buying something and paying too much for it.

Q. I understand that in your own personal activities, as well as in the activities of Continental Trading Company, Mr. Dobrzensky, Sr., who is sitting at the counsel table, was your attorney and legal advisor?

(Testimony of Grover D. Turnbow.)

A. Yes, that's right. I had a right to do that, too.

Mr. Resnik: I would ask the Court to instruct the witness to answer the questions and not to engage in side remarks, and we will proceed more rapidly. There is no question [139] that he has a right to do many things, but I don't think he has the right to make those remarks in the court.

The Court: Move to strike, Mr. Resnik, if there are any answers of the witness that are not responsive.

Q. (By Mr. Resnik): Did you discuss with Mr. Dobrzensky, Sr. the question of these can purchases in 1948 and 1949?

A. I don't recall discussing it, but I discussed most everything with him of every nature I needed to discuss with my attorney.

Q. In connection with the activities seeking to establish recombined milk plants in foreign countries—

A. I am sorry, I didn't hear your statement. I just got off the plane a few hours ago, and I still got the motors roaring in my ears, and if you will speak a little louder I will appreciate it.

Q. You testified on direct examination that in 1948, commencing in 1948, I believe, thereabout, some activities were undertaken by you in connection with the possible erection of recombined milk plants in other countries. You ran into a problem of not being able to convert foreign currency into

(Testimony of Grover D. Turnbow.)

between Mr. Turnbow and [142] Mr. Wenner-Gren after 1950; secondly, the matter of his travels to Italy in connection with the opening of a recombined milk plant in that country.

Q. (By Mr. Resnik): Was the question of conversion of foreign currency present in all of the activities that were undertaken at that time with reference to all countries?

A. Not Mexico. It was not in this deal.

Q. I realize that.

A. Yes. The answer to the question is yes, except not Supply Company, because that is made with the United States Government and that is on a strictly dollar basis, and therefore there were none there, and under PL 480, now—you could have done it now.

Q. Would it have not been possible for you, through your own enterprises, to have conducted these activities?

A. I didn't have enough money. Outside of that it would have been all right.

Q. Now, you have been asked in connection with various loans that were made by Continental Trading from the Bank of America and from Central Hanover—were any sums of money from those loans used in connection with the erection of any recombined milk plant?

A. No, except there was some money sent to Mexico that they may have put into some of the Mexican plants. I could not [143] verify that.

Q. You don't know that?

(Testimony of Grover D. Turnbow.)

A. I couldn't tell you at this moment.

Q. Didn't you in 1947 act as attorney in fact for Axel Wenner-Gren in this country?

A. I think that is about the right date.

Q. Didn't you, in connection with your activities as attorney in fact, negotiate personal loans to him from the Bank of America? A. Yes.

Q. Didn't you also, in connection with your activities as attorney in fact for Wenner-Gren, negotiate personal loans to him from the Central Hanover Bank? A. Yes.

Q. And at the time that—

A. I could add that I tried to get him interested in the Far East operation, but he wasn't interested. I would liked to have had him in on this, too. Mr. A. P. Giannini came to help me out.

Q. As president of Continental Trading do you know what use was made of the funds that were borrowed from the bank?

A. Only indirectly to some extent. I know they were used by Axel. Axel wanted to use them for—and partly for this can deal.

Q. How much money did they use on the can deal? [144]

A. I don't know. Let's see, it's \$2000—they told me, my secretary told me something like 90 carloads of cans. Is that about right? You have the information. I think it's about 90 carloads. You have the information.

Q. Now, Mr. Turnbow, you are a man who has been in business for a long time—



(Testimony of Grover D. Turnbow.)

A. I think they sold Servel, and I don't recall whether they sold any Electrolux. I don't think they did. I think those are the two securities that were involved, Electrolux and Servel, and they sold their Servel, but I can't recall on Electrolux. I don't think they did Electrolux.

Q. Well, now, those securities were owned by the company when you became its president, were they not?

A. Yes, sir. That is the way I recall it.

Q. Those securities were sold in order to liquidate the indebtedness that was——

A. The money borrowed prior to that, that's right.

Q. In connection with your activities as attorney in fact for Mr. Wenner-Gren, did you, on his behalf, or did he personally loan money from a company known as Teleric Incorporated?

A. Known as what?

Q. Teleric—T-e-l-e-r-i-c. [147]

A. Would you state the question again, and I will see if I can answer it.

Mr. Resnik: Will you read it?

(The question was read by the reporter.)

The Witness: I don't know the answer to that question. They were—Teleric is a corporation in which I had nothing to do with. I think, as I recall, it was in existence back prior to my many connections with this, but what was done about it, I may have sent some money to them if he told me to, but I can also find that out; my secretary would handle that.

(Testimony of Grover D. Turnbow.)

Q. (By Mr. Resnik): No need for that. During the years 1948—during the year 1948, what were your activities as an individual; what offices did you hold? A. Offices I held?

Q. Yes, in various companies.

A. I had my own personal business.

Q. That was International Dairies?

A. No, just my Grover D. Turnbow business.

Q. Oh, I see.

A. And I was president of International Dairy Supply Company during that year it was organized—in 1948 you said, didn't you?

Q. Yes.

A. And I was president of Continental Trading. I don't [148] recall any others at this moment.

Q. Did you have any office in International Dairy Association?

A. Oh, yes, that's right. International Dairy Association, which never functioned to speak of, but I was president of that, I believe.

Q. What about International Dairy Engineering Company?

A. That was just D.B.A., doing business as a private—what I said a moment ago, doing business as International Dairying Engineer. Later it was incorporated.

Q. Were there any changes in your activities in 1949, other than those we specified for 1948? You have more offices?

A. You asked me the same question for '49?

Q. Yes.

(Testimony of Grover D. Turnbow.)

A. Get your hand down. I can't hear you, see. Offices in '49—I was still president of International Dairy Supply Company. I don't recall whether Engineering was incorporated at that time or not. If it was I was the president of that; and when did Continental Trading withdraw from the United States activities? I was asked to resign, and you got that date.

Q. Yes, we have stipulated.

A. I was president up to the time they asked me—or some time a little before that, when Mr. Schultze came, I believe Mr. Schultze and Mr. Grenninger.

Q. Were you familiar with the activities of Mr. Wenner-Gren [149] when you acted as his attorney in fact?

A. As much as—to some extent. I don't think anybody is fully familiar with him being—

Q. What was the extent of your knowledge of his activities? What did you know of him?

A. What I know of him?

Q. Yes.

A. Oh, I had known Mr. Wenner-Gren since 1938 when he—when the Southern Cross picked up those 300 people in the—out from Norway, and saved them from drowning and brought them into port, if you remember that, and he was awarded a scroll of honor for having done this meritorious act, and everything he did. He came into this harbor in 1938, and that is where I first met him. I have known him for a good many years.

(Testimony of Grover D. Turnbow.)

What would you like to have me tell you about him?

Q. What were his business activities with which you were familiar during the time you were his attorney in fact?

A. This is only hearsay, but he had Electrolux business in 48 countries in the world. He has Servel in many countries. He was interested in many, many enterprises. He is one of the few billionaires in the world today.

Q. Were you familiar with any of his activities in the Republic of Mexico?

A. Oh, the milk business. I got him interested in the milk business. I wouldn't have gone forward without getting [150] him interested in it. Some of the Mexicans agreed to put in some money, but that didn't come through and he put some of his own into it; otherwise we would probably have never had a good milk supply in Mexico if it wasn't for him.

Q. Wasn't he in other ventures in Mexico himself?

A. He owned the Telefonos de Mexico, in which I had no interest.

Q. That is comparable to our American Telephone and Telegraph Company?

A. No, it is much smaller, *senor, si*. It is not nearly so big.

Q. Fewer telephones in Mexico?

A. It does have telephones, yes, and the Ericsson Company down there, which is owned by some

(Testimony of Grover D. Turnbow.)

Swedes—he was interested in that, too. They are all one company, I believe, and he was interested in Banco Continental, and he is interested in—he has some ranches, some farms down there. He has—he owns the Rancho Cortez, the old original rancho over near Cuernavaca, 90 acres there he rehabilitated. He owns really—he owns Paradise Island off of Nassau, and he owns half of Bermuda Island, and he has the Viking Wenner-Gren Foundation and gives Stanford a couple of \$300,000 a year, and 25 other institutions he gives out of that foundation a year. In fact, that is one of the ways I got connected with him, to get some money for the University of California to do some research work. [151] That is, he came back in 1938 which brought about our acquaintance.

Q. How much money did you borrow for Mr. Wenner-Gren when you were his attorney in fact?

A. I would like to answer your question pointedly if I can, but I just can't tell you. Several million dollars.

Q. Did he indicate to you or did you know what use he planned to make and what use he did make of those funds?

A. Well, partially. I was hoping they would all be used in recombined dairy plants in foreign countries, but I have explained the reason it wasn't—I couldn't use it for that, and he used the money for some of his other enterprises, which I have little or no information about. It was his money, it wasn't mine, see.



(Testimony of Grover D. Turnbow.)

Q. How were you reimbursed or remunerated for your services as his attorney in fact?

A. Well, Continental Trading—I was paid a salary by Continental Trading. I believe it was a thousand dollars a month.

Q. You only received that salary in the year 1950?

A. I don't know if I did or not, but if I did it is reported.

Q. Didn't you receive 10,000 shares of International Dairy Association stock?

A. Yes. You want it?

Q. As remuneration? [152]

A. Yes. Do you want it? I got the paper. I did have the paper. I took it back. The company never produced anything, so it would have been good if it had amounted to anything. It is one of those things, you know.

Q. After 1950 did you receive any funds from Mr. Wenner-Gren for Continental Trading Company in connection with any of the services or expenses you incurred on its behalf?

A. I am sure I didn't.

Mr. Resnik: I have no further questions.

Mr. Stacey H. Dobrzensky: We have no further questions. With respect, your Honor, to the matters that counsel raised, information he wanted from Mr. Turnbow, I suggest if you plan to take a recess we will see if we can obtain that during that period.

The Court: If we took a very short recess there

(Testimony of Grover D. Turnbow.)

probably wouldn't be time enough. I suppose it would be time enough if we took three quarters of an hour or so to bring us back here at the time we recess for lunch. Would it be agreeable if we go over now until 2:00 o'clock?

Mr. Resnik: I have a witness here.

The Court: Can you put him on?

Mr. Resnik: I think I can. That is, if the petitioner rests.

Mr. Milton W. Dobrzensky: We have yet to produce two pieces of information on the two points before the witness' [153] testimony is concluded, and technically I don't suppose we could rest until then. We have nothing further to offer after the testimony of this witness is concluded, and in effect we have rested when his testimony is complete.

The Court: Won't that be satisfactory, Mr. Resnik? Obviously if you bring anything out on cross they would have a technical opportunity for redirect.

Mr. Milton W. Dobrzensky: We have no further redirect contemplated now. Mr. Turnbow's office is a block and a half away.

The Court: This occurs to me. Mr. Turnbow could go back now while we are hearing from this other witness and return here even before we recess.

Mr. Milton W. Dobrzensky: Yes.

Mr. Stacey H. Dobrzensky: May I suggest we take a brief morning recess and obtain—arrange with him with respect to getting the information.

The Court: You will need some time for that.

(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: Five minutes.

The Witness: I want to point out I don't know whether this information is here or——

Mr. Milton W. Dobrzensky: That is what I wanted to check.

The Witness: If it is at my office the answer is simple. If it is in Oakland, it will take a little time to go [154] get it.

Mr. Milton W. Dobrzensky: We will ascertain that with a telephone call.

The Court: It is really not necessary unless he needs the services of you gentlemen in finding that out, because I was going to suggest if he comes back here before 12:00 o'clock we could try to put him on. It is understood he will come back at 2:00, is that satisfactory?

Mr. Milton W. Dobrzensky: He will be able to be back before 12:00 or close by.

The Court: All right.

The Witness: I am sorry I was not here on Monday, your Honor.

The Court: It worked out all right.

Mr. Resnik: May we take a brief recess?

The Court: I thought not, but if there is anything to be served by it we can do it.

We will take a five-minute recess.

(Short recess.)

(Witness excused.)

Mr. Resnik: In light of the understanding reached before the adjournment for the recess, the respondent will now call as its witness Mr. Almand.

Whereupon,

WILLIAM C. ALMAND

called as a witness for and on behalf of the Respondent, having [155] been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the stand and state your name and address for the record?

The Witness: My name is William C. Almand—A-l-m-a-n-d. I work with the Western Can Company, San Francisco.

Direct Examination

Q. (By Mr. Resnik): How long have you been in the employ of the Western Can Company?

A. Ten and a half years.

Q. What is your present position?

A. Well, I am what they call their inside salesman. To be more specific, all the orders and productions are funneled through me before they go into the plant; either directly or I receive them personally, or come through somebody else and I get them.

Q. You were so employed by Western Can in 1948, 1949 and 1950?      A. Yes.

Q. In substantially the same capacity?

A. That's correct.

Q. In fact, the same capacity?

A. That's correct.

Q. In connection with your services as an employee of [156] Western Can Company, can you describe briefly to us how orders passed over your desk, or passed through you?

(Testimony of William C. Almand.)

A. I would say that practically—well, maybe 90 per cent of all orders received for us—by us, rather, for manufacture and shipping of containers is verbal. Some are and some are not confirmed in writing. It is like any other business. You deal in good faith and you know who you are dealing with.

Q. Now, you are here in response to a subpoena served upon the company? A. That's correct.

Q. You have brought with you in response to subpoena duces tecum all the records of your company relating to can transactions during the years 1948, 1949 and 1950 with a company known as Continental Trading, Inc., as well as International Dairy Supply Company, is that correct?

A. That's correct.

Q. Now, in connection with the orders that came to your department in the name of Continental Trading, were those orders, or many of them, communicated to you over the telephone?

A. I would say practically all.

Q. With whom do you have contact in connection with those telephonic orders?

A. Well, as I recall, for the most part it was with Miss Palmer or Mr. Wickersham.

Q. At the time that an order came in over the telephone [157] did you take any steps to formalize that in accordance with your company's procedure?

A. Well, what do you mean by formalize?

Q. Did you write it up in a memorandum or in an order?

A. We immediately entered the order to allo-



(Testimony of William C. Almand.)

cate production and shipping programs, and so forth, and materials and so forth for their—for the particular order involved.

Q. This is the form?

A. This is the form we wrote the order up on.

Q. The witness is handing me a yellow form which appears to be a carbon copy?

A. That's right.

Q. A carbon copy of the original?

A. That's right.

Mr. Resnik: I offer this as Respondent's Exhibit.

Mr. Milton W. Dobrzensky: May we see it first, please.

Mr. Resnik: I am sorry. I thought you saw these.

Mr. Milton W. Dobrzensky: I don't know what you have reference to. We may have seen it.

The Witness: Could I ask the Court that these records be returned to us after they have served their purpose?

The Court: Well, that can be done. Serving the purpose may mean a matter of delay of quite a long time.

The Witness: I see. [158]

Mr. Resnik: If your Honor please, if any of these records are received in evidence I will ask leave to withdraw them at the close of the hearing here and substitute photostats and return the originals to Mr. Almand.

The Court: Normally we would stamp the fact

(Testimony of William C. Almand.)

that it was an exhibit on the document. Have you any objection to that?

The Witness: No, not at all.

Mr. Resnik: I will offer the exhibit referred to as Respondent's Exhibit next in order.

The Court: Any objection?

Mr. Milton W. Dobrzensky: No objection.

The Court: It will be received and marked in evidence.

The Clerk: Respondent's Exhibit No. D received in evidence.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. D.)

The Court: I neglected to ask you, Mr. Resnik, about the second supplemental stipulation. That has no exhibits?

Mr. Resnik: That is correct. It has no exhibits.

Q. (By Mr. Resnik): I show you now, Mr. Almand, Respondent's Exhibit D, and we note thereon some writing in pencil, and referring first to the writing at the bottom, which apparently is a telephone [159] number, "KL 2-2833, Extension 6265, Resnik." That, I gather, was added much later than the time that this document was executed?

A. As I recall, you people have been calling from time to time through the years about these records involved here, and at the time we were looking at them—that is Mr. Wood's, Henry Wood of our company's writing, he just wrote which appears

(Testimony of William C. Almand.)

to be your telephone number to see what he could find or give you some information or something.

Q. Ignoring that part of the penciled writing, which happens to be circled, also will you look at the other penciled writings and tell me whether you can explain what the other penciled writing is?

A. Well, the number 100 serves Continental Trading purchase order number, which in turn, referring to—

Mr. Milton W. Dobrzensky: Would you speak a little louder?

The Witness: There is a number 100 on their order which refers to the customer's purchase order number, which is Continental Trading Company's number, designating a certain shipment for a certain time at a certain location calling for a certain type cans which is involved in this order. The other—there is some other penciled notations on here about paper lining the cans, lining the sides and floor of the car with paper. When you first start shipping cans for a customer you [160] have to go along—you learn these different specifications and you have to learn what they want, what those notations are, what are involved here.

Q. (By Mr. Resnik): This Exhibit D, as well as all the other orders of the same type, bear a date on them, do they not?      A. That's correct.

Q. What is that date representative of?

A. That is the date that the order was received from the company involved, the customer.

Q. That is the communication over the tele-

(Testimony of William C. Almand.)

phone?           A. That's right.

Q. And after that telephone order is received, was it, in the case of cans shipped on behalf of—in the name of Continental Trading Company, followed up by a written confirmation?           A. Yes.

Q. Did those confirmations come in generally the following day?

A. There is no set time on them. They could be the next day or the next week or any amount of time involved when they got around to doing their clerical work. It was a matter of confirmation for a matter of record. Most large companies do send out purchase orders to confirm their transactions. It is a simple matter of keeping their records straight. When you do [161] a large volume of business and you try to remember all the transactions, verbally or orally, I think it tends to lead to a lot of confusion.

Q. Were you familiar with the type of cans that were being ordered?           A. Yes, sir.

Q. Were you familiar with the fact that all of the cans were to be used in connection with the fulfillment of a contract with the armed forces in the Far East?

A. Yes, sir. I was aware of that fact, yes.

Q. In that connection, then, there was no billing for sales tax?

A. No. Food products in general do not carry sales tax.

Q. Now, was it necessary at that time for you, in order to obtain the raw materials necessary for

(Testimony of William C. Almand.)

the production of cans, to indicate to your suppliers that some of your products were being made in connection with the fulfillment of orders for the government or the Army?

A. Well, that's a rather broad question. We make many, many types of containers under many types of specifications. In this particular instance the government specified what type of materials were to be used for the products involved, and when we order plate *for* our supplier, the tin plate, that is, to fabricate these containers, it is ordered by size. In other words, we have to order tin plate sheets, which is by size, per [162] container to be fabricated. It takes from our mill supply—mill supplier 90 days usually to get raw materials.

Does that answer your question?

Q. Was there any shortage of raw materials at that time?           A. At what time?

Q. 1948, 1949 and 1950?

A. No, not noticeably so. Well, let me qualify that. In 1950, I believe, is when the Korean War broke out, around August. At that time the government put restrictions on tin plate products. That didn't take effect until later in the year.

Q. I will ask you, Mr. Almand, if you would look at your records of the confirmation orders that you would write up and ask you when you received the telephone order with reference to a purchase order No. 102 of Continental Trading, Inc.?

A. 102?

Q. Yes.



(Testimony of William C. Almand.)

A. What do you want to know about it? Would you repeat the question?

Q. When did they telephone that order in to you? A. March the 21st, 1949.

Q. Now, with reference to purchase order No. 103, when was that telephoned in?

A. April the 4th, 1949. [163]

Q. What about purchase order No. 104?

A. April the 14th, 1949.

Q. When did you receive from Continental Trading the written confirmation of purchase order No. 104?

A. Well, I don't have a record of it. It was not stamped, no.

Q. It was not stamped? A. No.

Q. Did your company continue to supply the precise type of can after 1950 to International Dairy Supply Company?

A. Yes, sir, and I am happy to say we still do.

Q. Now, how is the price determined that your company charges for the cans here ordered?

A. Well, we have one price only for our containers of a certain type, of a certain specification. That only fluctuates normally due to increases or decreases and the cost to us of our mill supplies, which in the last ten years have always been up rather than down, and our labor and other raw materials, other than tin plate.

Q. As I gather it, there is a published price list for specific cans to the trade, and I suppose there is a customary discount of cash?

(Testimony of William C. Almand.)

A. One per cent.

Mr. Resnik: If your Honor please, I dislike very much having to encumber the record with a lot of orders from [164] this company and then have them photostated. I don't want to encumber the record, and I don't think we could afford the cost of photostating. I was wondering whether it would be possible for Mr. Dobrzensky and me to go over those orders and perhaps work out some agreement.

Mr. Milton W. Dobrzensky: If you tell me what you want to prove we may be able to stipulate to the fact. I as yet don't see the relevancy of any of this. If you tell me what you want to prove maybe we can agree to it.

Mr. Resnik: I am interested in proving the date——

The Court: Just a minute. Have you finished with this witness otherwise?

Mr. Resnik: Yes.

The Court: Well, now, wouldn't it be possible if we took a recess now that you could complete your agreement, whatever it is? We are going to have to wait and postpone the completion of the hearing until Mr. Turnbow gets back anyway. If we took a recess now and reconvened at 2:00 o'clock, couldn't you handle both of them?

Mr. Resnik: Yes.

The Court: In other words, I don't see any purpose to be served in a discussion on the record now of what you want to do, and so if you got together at a table with these documents you might very well

(Testimony of William C. Almand.)

be able to come to an agreement in a short time.

You say you have no more questions?

Mr. Resnik: No more questions of this witness, pending a determination of what can be done with reference to this.

Mr. Milton W. Dobrzensky: We will work out something with you.

The Court: Do you have anything?

Mr. Stacey H. Dobrzensky: I have a few questions that will take a very short time, and we can get that out of the way.

The Court: I think we should do that so he won't have to come back.

#### Cross Examination

Q. (By Mr. Stacey H. Dobrzensky): Mr. Almand, as I understand your testimony, these telephone calls from Miss Palmer and Mr. Wickersham were, in each case, followed by a written confirmation? A. Yes.

Q. And the written order is the one that is here?

A. Yes.

Q. I have in my hand Petitioner's Exhibit 33 which is a series of Continental Trading purchase orders addressed to Western Can. That would be the type of confirmation that followed each telephone call? A. That's right. [166]

Q. Was it unusual, Mr. Almand, to have orders placed with you in this manner, the manner in which they were placed by Continental?

A. Unusual in our business?

(Testimony of William C. Almand.)

Q. Yes.

A. No, that is common procedure.

Q. Was it unusual in your business to arrange for production or allocation of materials on orders on the telephone, advance notice, as was done in the case of Continental?

A. That is a common practice also. We are—our type of business is not such that—as in comparison to a retail business where you go in and say, “I want two of these,” and they can serve you right there. We have to plan production and scheduling and materials according to what is involved to produce and ship, so forth. In other words, a week or so is involved after the advance notice.

Q. With respect to the shipments pursuant to the orders from Continental that came in the manner you described, do you know from your having dealt with them whether there was any pattern as to the designation, as to inside or outside the State of California?

A. As I recall, I think all of these cans went outside the State of California.

Q. I will show you Petitioner’s Exhibit No. 34, which by my count is 92, that are Western Can invoices with a check [167] attached. You recognize them, I take it, as being the invoice for billing your company sends out when it fills an order?

A. That is correct.

Q. Were each of the invoices ordered by Western Can to Continental paid by Continental?

A. I couldn’t answer that.

(Testimony of William C. Almand.)

Q. So far as you know?

Mr. Resnik: I will stipulate they were.

The Witness: I would assume they were.

Mr. Stacey H. Dobrzensky: Just one moment.

Q. (By Mr. Stacey H. Dobrzensky): I have one further question, Mr. Almand. If you know, did Continental Trading, Inc., or Mr. Turnbow, or International Dairy Association, or International Dairy Supply Company, have any interest or ownership in Western Can Company?

A. No, sir; not to my knowledge, anyway.

Mr. Stacey H. Dobrzensky: That is all.

Mr. Resnik: I have no questions.

The Court: Will you remain here long enough so that counsel can get from you whatever information it is they want?

The Witness: Be happy to.

The Court: You can be sure they have reached an agreement, and then if it is necessary we will call the witness for any further questions.

You may be excused. [168]

(Witness excused.)

The Court: We have nothing more before the lunch recess, have we?

Mr. Milton W. Dobrzensky: Nothing, your Honor.

Mr. Stacey H. Dobrzensky: I think, your Honor, if at least possible we would have stipulated about the matters Mr. Turnbow is digging out so that it won't be necessary to have a witness on the stand at 2:00 o'clock.



Mr. Resnik: I have asked that Mr. Turnbow return.

Mr. Milton W. Dobrzensky: Very good.

The Court: I think it was the understanding, though, that he was to return only for the purpose of answering those two questions.

Mr. Stacey H. Dobrzensky: Yes.

The Court: In other words, I don't want to project it all afternoon with some additional questions.

Mr. Resnik: I should be candid with the Court, and I think it is possible I may request the Court to give me the opportunity to ask more than that, but I would like to await his return.

The Court: This much has to be clear. There won't be any further opportunity given to go and collect more information. The whole purpose of handling it the way we did was to be sure any questions Mr. Turnbow was to look up, he would be told before we excused him from the stand. [169]

Mr. Stacey H. Dobrzensky: Merely to supply his answers to two questions, and that was it, as I understand it.

The Court: That was my understanding.

Mr. Resnik: If necessary, I can call him as my witness. We haven't concluded the presentation of our case as yet.

Mr. Stacey H. Dobrzensky: In any event, we will return at 2:00 o'clock and hope we have a stipulation, and Mr. Turnbow will be present. We will get Mr. Almand out of our hair.

The Court: What I am asking you to do is con-

sider seriously not extending the examination beyond what we originally contemplated.

We will take a recess until 2:00 o'clock.

(Whereupon, at 11:45, a.m., a recess was taken until 2:00 p.m., of the same day.) [170]

Afternoon Session, 2:00 p.m.

The Clerk: We will proceed with Continental Trading Company.

Mr. Milton W. Dobrzensky: Mr. Turnbow is here, your Honor, and has the information in response to the questions.

Mr. Resnik: May we complete the other matter that was pending before the Court with reference to some exhibits of the witness who was on the stand, Mr. Almand. Your Honor will recall that there was received in evidence Exhibit D, a copy of the telephonic order prepared by Western Can Company, and we asked leave to withdraw it and substitute a photostat, but that won't be necessary now. We will ask leave to withdraw not only that exhibit, but all other exhibits but the originals will be sent back to the court. We offer in evidence 83, or thereabouts, additional telephone orders of Western Can Company, which are the same type as Exhibit D, and we will offer the 83 as one exhibit.

Mr. Stacey H. Dobrzensky: May I have a look at them, Counsel, before we go further?

Mr. Resnik: Counsel saw these before lunch and during the luncheon recess.

Mr. Milton W. Dobrzensky: The slips behind, I don't know what they are.

Mr. Resnik: They were on the——

Mr. Milton W. Dobrzensky: That is all right.

Mr. Stacey H. Dobrzensky: If the Court please, we will object to the introduction of these. I don't see that they are relevant or material to any issue of the case. The fact of these transactions is stipulated to. The documents of the petitioner—in fact, the documents from the same company are already in the record establishing clearly the transactions at each point along the way, and I fail to see what purpose they serve or that they are relevant to any issue in this case, and I place our objection on that ground.

The Court: Do you want to be heard?

Mr. Resnik: If there is any doubt in the Court's mind as to its receipt, I certainly want to be heard, but I can't imagine the Court would not receive them.

The Court: Aren't these duplicates of originals that are in some other exhibits?

Mr. Resnik: No, they are not, your Honor.

The Court: Now, the originals of those would have been sent to Continental Trading?

Mr. Resnik: No, your Honor. I believe the witness explained that at the time an order is received over the telephone by his company the man at the desk, that being Mr. Almand would have prepared a form, which is now Exhibit D in evidence, an original and a carbon. For some reason or another, the originals are not any longer in existence but the carbons are here. [172]

The Court: Do we know what happened to those originals?

Mr. Resnik: Yes. Well, we didn't bring it out in his testimony because no question has ever been raised. The fact is that these are internal—these are merely internal papers of Western Can Company. One copy is retained in the sales department. The other goes forward to the processing of the order. After one of these is prepared, Mr. Almand testified, he would receive almost in every case, and I think in this instance in every case, the written confirmations from the company in support of the verbal telephone order.

Now, the company was able to produce, pursuant to a subpoena they bring all their records in, these as well as copies of some of the other documents, which are now in evidence but which we don't need. These documents which I offer as Exhibit E, and documents as Exhibit D, establish the time when the order was given to Western Can Company for the particular cans. It would be very simple for the court to tie together the copy of the telephonic order with the written order, because appearing on almost every one of the 82 sheets is a number at the top, 100 being the first exhibit, going to 101, 102, so forth, which are the numbers appearing on the purchase orders, Exhibit 35.

The Court: Do I understand your purpose in introducing these is to supply an element which doesn't appear otherwise?

Mr. Resnik: That is right. It doesn't appear any [173] place else in the record.

Mr. Stacey H. Dobrzensky: If the Court please, in the first place the stipulation sets forth there was telephone notification to Western Can for each one of the orders placed by Continental.

The Court: Does it say when?

Mr. Resnik: No. We received all this cumulative evidence here over my objection.

Mr. Stacey H. Dobrzensky: As I recall, and the language is before us, prior to the transmittal of the written order—it doesn't say how many days, no, your Honor. This witness' testimony covered these. These are internal records of Western Can. The exhibits counsel objected to are records of the petitioner and establish the points of these transactions. These documents never were sent to petitioner and never came to their attention. They are merely internal records of the seller of cans, whereas the other documents there, Petitioner's Exhibits 32 through 36, are petitioner's records of these transactions in the various ramifications of it, which, of course, they did have notice of and did have the use of.

The Court: That wouldn't make them inadmissible, and neither would it make them irrelevant. If the fact is that we have a good part of the history of the transactions here, but we don't have it all and these furnish some missing element, I don't see that that would indicate that they weren't [174] admissible.

They will be received and marked in evidence, one exhibit.



The Clerk: Respondent's Exhibit E is received in evidence.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

Mr. Resnik: I would just like to make a statement in reference to that. It was quite clear when we adjourned here and I released Mr. Almand that there be no questions as to the receipt of the document or the data contained thereon, if I found time to make a schedule.

The Court: That may have been clear in some private conversation, but it was not part of the agreement we made here. The agreement was if counsel could stipulate that that could be used in lieu of Mr. Almand's testimony. It was under that assumption and he would be excused.

Have you anything further, now, on what would have been Mr. Almand's testimony?

Mr. Resnik: No, your Honor. That would complete Mr. Almand's testimony.

Mr. Stacey H. Dobrzensky. I was going to say I know Mr. Turnbow would like to get back to his affairs. He has the information on the two questions which he dug out of his records. One had to do with the settlement with Mr. Wenner-Gren, and the [175] dates of trips to Italy in 1948, 1949 and 1950. We handed counsel a written statement of that, but he prefers to have Mr. Turnbow give it from the stand, as I understand it.

Mr. Milton W. Dobrzensky: Mr. Turnbow.

Whereupon,

GROVER D. TURNBOW

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified as follows:

The Witness: May I proceed to answer the questions?

The Court: Perhaps it would be better if Mr. Resnik puts the questions to you.

The Witness: Thank you.

Cross Examination—(Continued)

Q. (By Mr. Resnik): Mr. Turnbow, this morning I asked you whether you had had a settlement of your affairs with Mr. Wenner-Gren some time in 1950 or 1951, and you said you didn't recall, and you said you would check your records to see whether by checking your records you could refresh your recollection? A. Yes, sir.

Q. It is our understanding you have done so. Now, can you tell us whether you finally did have a settlement of your affairs with Mr. Wenner-Gren?

A. The answer is yes. [176]

Q. When did that take place?

A. I met him the last half of June in New York in 1950.

Q. Are you reading from something?

A. I have some notes. I dictated these to my secretary.

Q. Can you testify without regard to those notes? A. What did you say?

(Testimony of Grover D. Turnbow.)

Q. Can you testify as to these facts without regard to those notes?

A. The dates, I haven't memorized them, if that is what you mean. I would like to refer to my dates.

Q. You dictated this?

A. To my secretary since I left here and been back and she made a copy of it. The dates were taken off of my records at the office.

Q. You were telling us when?

A. Last half of June I met Mr. Wenner-Gren in New York in 1950, made a settlement with him.

Q. What occasioned the meeting and the need for this settlement?

A. I am sorry, I didn't bring that along with me. If I had it I—apparently it is a matter of Continental being no longer needed, at least I wasn't satisfied with it, but then I wouldn't—I don't know what occasioned it. He probably coming to New York have something to do with it, and I met him in New York. Let's see. I had a settlement with him, and I agreed to [177] surrender the 10,000 shares of International Dairy Association that I owned, which is 10 per cent of International Dairy Association, and in exchange for 5,000 shares of Electrolux stock. I don't know whether you asked for this or not, but then I reported the \$10,000 investment in 1947, and I reported it and the stock at that time. At the time I made this deal it was selling on the market at a price of \$55—\$55,000, pardon me, \$55,000. I had a gain in this transaction of \$45,000.

(Testimony of Grover D. Turnbow.)

There is another part to this if you want it. You asked me about further settlement. Do you want it?

Q. Sure, I want the terms.

A. I was about to finish.

Q. Go ahead.

A. In addition, since I never had been paid for my services from Mr. Wenner-Gren in connection with the affairs, and since we were terminating our relationship, he agreed to pay me \$50,000 covering three months of 1946, all of 1947, all of 1948 and 1949, and for the six months of 1950.

Now, I would like to make an addition to that, a correction from this morning. I told you I was paid a thousand dollars a month. I find in looking up that I was paid \$1500 a month, and he agreed to pay me from July the 1st, 1950, to the end of the year a thousand dollars—\$1500 a month, which he did for the last six month period.

Q. Now, you not only have the 5,000 shares of Electrolux [178] stocks, but you got \$50,000 some time?

A. No, I got 5,000 shares of Electrolux which was worth \$55,000.

Q. Then you get \$50,000 in cash?

A. Oh, yes, that's right.

Q. In addition? A. That's right.

Q. Now, then, as I understand it—

A. Some of it I took a note for. I didn't get the cash then, see.

Q. Was the note ultimately paid?

A. The note was ultimately paid, that's right.

(Testimony of Grover D. Turnbow.)

Q. Now, there was one other matter we asked you about. You said you made a trip to Italy in connection with your activities, seeking to establish a recombined milk plant?

A. In November, 1948.

Q. And that was the only——

A. I was in Italy discussing that in November.

Q. That was the only trip you made to Italy in 1948, 1949 and 1950?

A. That's right. I testified this morning they came here after that, and in fact they had been here before that. This was the interim transaction.

Mr. Resnik: There is one other matter, your Honor. I would like to cover by a very few questions to the witness [179] which I could have covered this morning but inadvertently failed to do so. I could call the witness as my own, if I am required to; otherwise I can proceed in this order. It relates to one transaction covered by the stipulation to which I would like to refer for clarification, if possible.

The Court: What is your position about that?

Mr. Stacey H. Dobrzensky: Your Honor, I think we understood this morning we would bring him back for the answers to two questions he had to dig up from his records. Counsel can call him, and perhaps the best thing to do would be to get the job done, although I certainly hope they aren't questions that will require his going back and digging up more records and coming back again.



(Testimony of Grover D. Turnbow.)

Mr. Resnik: He was under subpoena to bring all the records of the company here.

Mr. Milton W. Dobrzensky: The subpoena was addressed to Mr. Turnbow and not to any corporation. You should have addressed the subpoena to the corporation when you want corporate records brought in. He is no longer an officer of Continental Trading. The subpoena was addressed to him as an individual, not as an officer of any company. We have the records here that are mentioned if you want them.

The Court: I am still not quite clear whether you want Mr. Resnik to be considered on direct examination from now on or whether you are satisfied to have him continue. [180]

Mr. Stacey H. Dobrzensky: I am satisfied to have him continue, because I think the important thing is that Mr. Turnbow wants to get through and get away, and as long as we don't have to go back and dig up further records it is all right.

The Court: Proceed.

Q. (By Mr. Resnik): Mr. Turnbow, in connection with your own activities and those of International Dairy Supply, and particularly as it related to the government contract to supply milk to the Far East, was it necessary for you to buy dry milk fats, dry milk solids, in this country?

A. Yes, sir.

Q. Did you or did International Dairy Supply at any time engage in buying and selling of dairy products on a commodity exchange?

(Testimony of Grover D. Turnbow.)

A. Would you repeat your question?

Q. I say, did you at any time or did International Dairy Supply ever engage in buying and selling of dairy commodities on the commodity exchange?

A. Supply Company you are talking about?

Q. Yes.           A. No.

Mr. Stacey H. Dobrzensky: We object to that question as having no relation to any direct examination or any transactions that are here in the record or the stipulation. He is [181] inquiring, as I understand it, into his private business affairs.

The Court: All that would mean would be that if he wanted to ask the question he would make the witness his own witness now. If you want to go through that, that comes right back to what we were doing before.

Mr. Stacey H. Dobrzensky: All right.

The Witness: I should qualify that by saying you are asking me quite a question. As far as I know, there were none because there was no reason for selling them, no reason why Supply Company couldn't do it. But to my recollection, I don't recall of them being sold.

Q. (By Mr. Resnik): Now, we have in the record here the fact that there was purchased from Continental Trading Company a carload of butterfat from the Kraft Company in July of 1948. Are you familiar with that transaction?

A. What form was it in?

\* Q. Perhaps you can tell us.

(Testimony of Grover D. Turnbow.)

Mr. Milton W. Dobrzensky: If you are referring to a document in the stipulation, which stipulation he has never seen, I suggest it be shown to him.

Mr. Resnik: I am not referring to any documents. I am asking the witness what he knows about this, if any.

Q. (By Mr. Resnik): Do you have any knowledge? [182]

A. You are asking me to recall every transaction that has been made for years back from memory, sir. We make thousands of them. I don't know the one you have in mind. If you will help me identify it maybe I can help you get the question answered.

Q. I will show you Exhibit— A. Fine.

Q. I will show you Exhibit A in the record, which is the tax return of Continental Trading, Inc., and there is your signature, I believe, as president? A. That's right.

Q. Under Schedule D, appearing on page 2, we see a transaction, one car of butterfat acquired 7/12/48?

A. I can tell from the price, \$40,000, is that right? That is anhydrous, 98 per cent pure fat. That is not butter; that is not cream. That is anhydrous fat.

What do you want to know about it?

Q. Are you familiar with that transaction?

A. It says so on there. There must have been one, yes.

(Testimony of Grover D. Turnbow.)

Q. You have no knowledge other than what appears on the tax return at this moment?

A. I wouldn't want to say I don't have, but I don't have specifically, if that is what you mean, because it shows we sold the—Continental sold their—did they purchase? Is that a purchase? [183]

Q. Well—

A. I think I know what you mean. Let me see what you have got, will you? Guessing is dangerous business here. I hate to guess at these damn things—pardon me, your Honor.

Yes, there is a loss on it. I know the time we made the loss. We bought a car of butterfat on the butter market, and the market went down. Anhydrous fat is tied to the butter market, and we sold it rather than hold it because the keeping quality wouldn't be indefinite enough—good to hold it back for next year. Is that what you want to know?

Q. Did you, as an individual, ever engage in transactions similar to the one you have just described?

A. That is the only one I think I lost money on. It isn't my intention to lose money, but occasionally I do. I think that is the one in my life. That is the only car I lost money on, and that is because the market changed, but that isn't the first time I lost money.

Q. Did you, as an individual, engage in similar transactions on your own?

A. No, I told you that. We make—anhydrous fat is made for making reconstituted milk and

(Testimony of Grover D. Turnbow.)

shipped to the Far East. I had a contract with the United States Government, and I didn't lose money and that is the only car I told you I lost any money on. I am sure that is. I don't think I would be foolish enough to do the same thing twice. [184]

Q. Could you have used the anhydrous fat covered by this transaction in making recombined milk?

A. Not at the time of that transaction because the recombined plants weren't in operation. That is way back—that is in '48, isn't it?

Q. Yes.

A. All right. It was made by Kraft. Kraft don't make our product any more, see.

Q. When were you familiar with the fact that your contract with the Army was of July, 1948?

A. July, 1948, and the Army contract had nothing to do with anhydrous fat. It has to do with recombined milk. I can sell it any place I want in the world or the United States. There is no relationship at all. That had nothing to do with Supply Company.

Q. Didn't you say before that that anhydrous fat is one of the ingredients or one of the necessary elements in the making of recombined milk?

A. And recombined ice cream and making of chocolate milk, and many other products.

Mr. Resnik: I have no further questions at this time.

The Witness: Obviously he is not a dairy man.



(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: No further questions.

Mr. Milton W. Dobzensky: May the witness be excused [185] now?

Mr. Resnik: Yes.

The Witness: Thank you.

The Court: Thank you.

(Witness excused.)

The Court: Is that the petitioner's case?

Mr. Stacey H. Dobrzensky: That is the petitioner's case, yes.

Mr. Resnik: The respondent rests, your Honor. I think my request to withdraw the exhibit is clear in the record now.

The Court: I am not clear about it. As I understand it, you want to withdraw them, but you don't want to photostat them, and you will return the original.

Mr. Resnik: I will return the originals in order that we can use the——

The Court: Where does that leave poor Mr. Almand? You told him this morning, in my presence, whatever you took from him you would photostat and return the originals to him.

Mr. Resnik: Mr. Almand and I had lunch and he decided that maybe the simplest thing would be for him just to let the Court have them and get them back when he can, because the burden of preparing a schedule is too great.

The Court: Well, I hope that you will undertake to keep him advised, then, of when he will be

able to receive them [186] back. I had better leave it up to you.

Mr. Resnik: The government makes a request when a case is finally closed to have all the exhibits withdrawn that we put in, and I think the Court then releases them to us.

The Court: That is not by any means automatic and very often doesn't happen, so I am asking you to take the responsibility to see it does happen in this case, and when you do get them back to see that he gets them.

Mr. Resnik: I certainly will.

The Court: Thank you.

The Clerk: As I understand it, your Honor, he is withdrawing also Exhibits 32, 33 and 34?

The Court: He wants permission to withdraw them.

Mr. Resnik: Yes, permission.

The Court: Of course, if it is possible for counsel to arrange to combine that operation, it is that much simpler when you withdraw them; make them available.

Mr. Stacey H. Dobrzensky: The exhibits counsel is requesting we will not have a need for, and so that we have no objection to his withdrawing them with your Honor's permission and returning them.

The Court: All right. It seems to me if he is going to refer to them and presumably is in his brief, they ought to be available to you if you want to see them.

Mr. Stacey H. Dobrzensky: That is correct. [187]

Mr. Resnik: They will be here in San Francisco, and we will be happy to make them available.

The Court: I will leave that to you.

Mr. Resnik: I don't think there will be any problem.

The Court: I don't think so either.

What about briefs?

Mr. Resnik: Does the Court have any pleasure as to the type of briefs? In any event, I would like to ask for more time than is permitted under the rules.

The Court: I always prefer to have simultaneous briefs. I don't see any reason for deviating from that in this case unless there is a special request. How much time do you want?

Mr. Resnik: I would suggest 90 days for the opening briefs.

The Court: Do you have any objection?

Mr. Stacey H. Dobrzensky: No objection.

The Court: How much time for reply?

Mr. Resnik: At least 30 days.

The Court: 90 days for the original brief, 30 days thereafter for each side to reply.

Will you read those dates?

The Clerk: The original brief will be due December 31, and the reply brief will be due January 30.

The Court: Are you sure that is right? [188]

The Clerk: No.

The Court: November 30. I think, as a matter of fact, that is cutting them off by one—I guess that is right, November 30 and December 31.

November 30 for the main briefs, December 31 for the reply.

Is there anything further?

Mr. Resnik: Nothing further.

Mr. Stacey H. Dobrzensky: Nothing further, your Honor.

Mr. Resnik: I want to thank your Honor.

The Court: Thank you, gentlemen.

It is submitted, and that concludes the present tax court hearing in San Francisco.

(Whereupon, at 2:35 o'clock, p.m., the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed Sept. 17, 1956.

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[Title of Tax Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

Court Room No. 2, Internal Revenue Building,  
Washington, D. C., Wednesday, November 27, 1957.

(Met, pursuant to notice, at 11:45 o'clock a.m.)

Before: Hon. Clarence V. Opper, Judge.

Appearances: Fred R. Tausill, Esq., 824 Connecticut Avenue, Northwest, Washington 6, D. C., appearing on behalf of Petitioner. John R. Moodie, Esq., (Hon. Nelson P. Rose, Chief Counsel, Internal Revenue Service), appearing for Respondent. [1]\*

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\* Page numbers appearing at top of page of Reporter's Transcript of Record.

## Proceedings

The Clerk: Docket No. 55212, Continental Trading, Inc.

Will you state your appearances, please?

Mr. Tansill: Fred R. Tansill, for the petitioner.

Mr. Moodie: John R. Moodie for the respondent.

The Court: Proceed, please.

Mr. Tansill: I would like to say first I have at counsel table with me Mr. Edward Leon who is not admitted to practice in this court, but is a member of the bar of various courts including those in New York State and the District of Columbia. He is co-counsel in the case.

The Court: You say he is co-counsel in this case?

Mr. Tansill: He is associated in the conduct of the case. He has not entered an appearance in the matter. I simply asked him to sit at counsel table with me, unless your Honor objects.

The Court: It is probably not very important. I don't think you can refer to him as co-counsel.

Mr. Tansill: Very well, I will withdraw the remark.

Now, if your Honor please, we have for consideration this morning a motion filed, or I should say a motion lodged with this court on November 19. That motion is for leave to file a motion to vacate the decision to reopen this [2] proceeding and to take further testimony.

In this particular case, which is Continental Trading, Inc., Docket 55212, a decision was filed in this Court on December 4. The substance of the decision is to the effect that this corporation is a



cusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59-B. Fraud, the judgment is void, the judgment has been satisfied, released or discharged, and finally, any other reason justifying relief from the operation of the judgment.

I have also referred to the work by Mr. Flaherty here entitled, *C. Practice Manual*, with forms, which relates to the District Courts of the District of Columbia, published in 1950. I find in Section 2412 the statement that a new trial will be ordered where there are new and material facts [5] which have come to light since the trial. Obviously this was an author's statement.

I find, also, a statement in a District Court decision, *Ishikawa v. Acheson*, decided by the District Court in Hawaii, 1950, reported at 90 Fed. Sup. 713; just the one sentence from that: Again this involves a situation of ordering a new trial. It said, quote, "the showing of alleged newly-discovered evidence and supported motion for new trial need not present an air-tight case. It suffices if a showing is made of sufficient new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details."

We feel that that quote is very close to our situation. So we approach now the second question, what would be the effect if this Court would grant this motion?

The case of *Simon v. Commissioner*, reported at

176 Fed. 2nd 230, see decision of the Second Circuit in 1949, holds in effect the granting a motion for leave to file a motion for reconsideration suspends the running of the appeal period and leaves the matter entirely open.

I understand, on the basis of conversations with *represents* of the chief counsel that they adhere and follow that rule.

So, now we arrive at the merits of our motion.

Our position is simply this: That either through mistake or inadvertence, or under the doctrine of newly-discovered evidence, and even upon the broad general ground of an unjust result, our motion should be granted.

We say this fundamentally because we believe there has been discovered relevant and material new facts which were not adduced at the hearing before this Court. Specifically, facts which relate to the conduct of activities in the United States during the taxable years by or on behalf of this taxpayer.

In addition, we believe that some of this new evidence tends to contradict various evidence submitted in the Court.

Finally, we believe that this new evidence, if permitted, would fill in the gaps and details, and show the purpose and the operations of petitioner in a somewhat different light than was presented to the Court. We would say here that there has been a mistake, or perhaps more accurately a misconception of what the real legal issue was in this case which had the inevitable result of the presentation

of the evidence, and I refer specifically to the position of counsel in the prior trial who apparently, if his opening statement, his brief, and his motion for reconsideration are to be believed, took the position that he did not have to show as a matter of law that Continental [7] Trading, Inc., was engaged in the trader business in the United States.

Your Honor, of course, held to the contrary, but the significant thing to me is having conceptually approached the problem the way he did, it is perfectly understandable why other evidence was not presented.

To illustrate, minute books, correspondence files, account books, officers and directors of this corporation were not resorted to.

Now, I am perfectly aware that in a sense this cuts two ways. It may be perhaps argued that this merely illustrates lack of due diligence on the part of prior counsel. However, I would take the position that what we are talking about here really is mistake or inadvertence, which perhaps gets blended with the concept of newly-discovered evidence, but in any event, whatever these distinctions may be we have a profound conviction that if additional evidence were permitted to be offered in this case, it might well convince your Honor to a contrary result on a factual basis from that which was initially reached by this Court.

I might say if your Honor is willing to hear them, I have available in court two of the officers and directors of this company who were in those capacities during the tax years. One of these

gentlemen, Carlos Grenninger, [8] is here from Mexico City. He actually kept the books and records in his own hand during these years. He was not a witness at the prior hearing.

I have also Mr. William A. O'Connell, who for many years has resided in Mexico, and was an officer and director in this company, and familiar with its operations and background.

As my motion indicates, Mr. Axel L. Wenner-Gren, himself, would be willing to testify in a proceeding relating to this company, and in fact would have testified at the prior hearing had he been requested to.

The Court: May I interrupt you at this point?

Mr. Tansill: Yes, sir.

The Court: I don't want to get into all the things that you have spoken about, but I fail to find that statement in Mr. Wenner-Gren's affidavit, that he would have appeared.

Mr. Tansill: Near the bottom of the first page: "I was not advised of the pendency or hearing held in the Tax Court of the United States in this connection, nor was I invited to testify as a witness. Had I been invited to testify as a witness, and had I testified, I could have been able to present additional evidence bearing upon the issues presented to the Court."

The Court: Under the circumstances, with all the [9] infirmities there are in your position, I am pointing up the fact that there is no statement under oath that he would have appeared, or even that he would appear in a new proceeding.

Mr. Tansill: That was certainly the clear intention of the affidavit, your Honor.

I personally helped prepare this affidavit in New York about two weeks ago in the presence of Mr. Wenner-Gren. If it fails to reflect the fact, it is due to my draftmanship.

The Court: Are you telling me now I ought to do something now on account of the inadequacy of the present counsel?

Mr. Tansill: No. I am simply trying to clear up the point your Honor raised. I have the verbal and personal assurance of Mr. Wenner-Gren, if this case is set he will testify.

The Court: I just think that the laxity in the entire conduct of this is now being reflected anew. This is presumably a serious proceeding, a serious motion, and what I would consider to be the most vital statement at all isn't made.

Mr. Tansill: Well, your Honor, again I must confess, we have done this under terrible pressure of time. As I pointed out we were retained in mid-October to prosecute [10] an appeal, and Mr. Wenner-Gren——

The Court: I am sorry I interrupted you.

Mr. Tansill: That is all right. I am trying in a sense trying to justify my own lack of carefulness in the preparation of these papers. We have been under considerable pressure of time in trying to get people from out of the country here to try to ascertain the facts. I can assure you verbally, whatever that is worth, Mr. Wenner-Gren has told me personally, had he been asked to testify in the



prior trial he would have done so, and if a new trial is granted here he will testify. He will be anxious to justify and explain what is involved in this case.

He also, I might say, feels that an inadequate and in part an inaccurate story was given to the Court.

The Court: Proceed, please.

Mr. Tansill: Now, at this time, if your Honor wants to, I have two witnesses, if you care to hear briefly from them.

The Court: No, I don't think that is any way to present a motion.

Mr. Tansill: Then, if your Honor will hear me, I would like to indicate rather briefly and quickly some of these items of newly-discovered evidence we are talking about, and perhaps put this thing in focus.

The Court: Do they appear in the motion papers?

Mr. Tansill: No, they do not, your Honor.

The Court: Unless Mr. Moodie wants to agree they are facts, I don't think that they——

Mr. Moodie: I couldn't agree to that, your Honor, because I don't know what they are.

The Court: It seems to me the motion, specially the motion considered——

Mr. Tansill: The motion as it is there has been newly-discovered evidence. This comes in that category I am talking about now. We didn't have exact knowledge of what we were going to discuss today when that motion was prepared. Primarily, it

has been discussed and developed in the last two days.

The Court: I am aware of the situation dealing with the dates involved here, but in a way this again exaggerates the difficulty that exists in this whole situation.

Now, you, as I understand it, were retained early in October. This motion wasn't even made until the middle of November. We are now right up against the ceiling as far as the jurisdiction of the Tax Court is concerned. It seems to me it would in effect be encouraging dilatory proceedings to say that anything ought to be done now which would extend that period of finality.

I recognize it might take time to get into a case like this, but I think I suggested that that indicates the [12] infirmity of this whole position. I have to take things for granted if I am going to accept your position, I have to take things for granted that are presumably an essential part of the considerations on the basis of which any motion like this could be granted.

Mr. Tansill: Well, may I say this, your Honor? Realizing, as I did, the potential defectiveness of my position, in the sense I couldn't spell out there the facts I am talking about, I asked the two gentlemen to be here available today, so you wouldn't have to take my word for it, so if you cared to you could hear their sworn testimony. And I would suggest it would come under the broad language I attempted to use, namely, that there is newly-discovered evidence.

The Court: Well, unless Mr. Moodie has a feeling that he wants to have it done, I still don't believe that is the way to do it.

Mr. Moodie: No, sir, your Honor, we would object to that.

Mr. Tansill: Well, will your Honor permit me to make a proffer of proof as to what these gentlemen would say in essence if they were called to testify?

The Court: I don't suppose I can prevent you from making an offer of proof, but certainly the purpose of an offer of proof is not the purpose that you are dealing with [13] in this case.

Mr. Tansill: As I understand it, your Honor, I conceivably and admittedly have the burden of trying to convince your Honor to exercise discretion in granting the motion. I think the basis of the motion is some mistakes have been made.

The Court: May I interrupt you?

Mr. Tansill: Yes, sir.

The Court: You are asking for a further hearing?

Mr. Tansill: That is right.

The Court: Before I grant a motion for the further hearing, you want me to have the further hearing in effect. When I say no, I don't think over Mr. Moodie's objection I should do it, you make an offer of proof which is the kind of thing you do in a hearing or trial, because you think the judge has made a mistake and refuses to take the evidence, and you want to preserve it for appeal.

Now, as I say, I can't prevent you from doing it;

but I don't think it take the place of an affidavit.

Mr. Tansill: Following that suggestion, if your Honor wishes, I can have affidavits prepared and submitted this afternoon from these gentlemen.

The Court: Then I would have to say I will have to continue the motion until next Wednesday, to give Mr. Moodie an opportunity to see them. You couldn't ask me to [14] take the next party, without hearing from him?

Mr. Tansill: I probably could ask it. Whether it would be in good order is another question.

It seems to me, I having the burden here, should be permitted to try to bring to your Honor's attention any relevant facts that bear on the question of has a mistake or an inadvertence caused a miscarriage of justice? That is all I am attempting to do under the time limitation.

Mr. Moodie: Your Honor, we take the position that the motion on its face is what we are arguing today. We don't know anything about anything else other than what is in the motion. We are prepared to argue on the motion as filed and called for hearing.

The Court: I think that is the only fair position to take. That is the purpose of making a motion, the purpose of giving notice, the purpose of filing supporting papers. It is true that you have the burden, but so you did from the very beginning.

I would think that Mr. Moodie is correct in saying that if he is to meet anything else, he has to be given an opportunity to meet it.

Mr. Tansill: How else, under these circumstances,

can I get to your Honor's attention the real meat of the problem here, namely, what new evidence we say should be considered? [15]

The Court: The only practical way that I can think of is the one I just suggested. If you want to have the motion continued, if you want to file further supporting affidavits, and Mr. Moodie has no objection, then we will come back a week from today with the material at a point where he has seen it and is able to meet it. That is the only practical thing I can think of.

Actually, as you know, this motion would never have been set for today if it hadn't been for your special urging and for the acquiescence of the respondent. I wouldn't think of having the Clerk give a notice as short as this, in a case that originates in San Francisco.

Mr. Tansill: We are aware of that, your Honor. Everybody has been most cooperative.

Admittedly, we are under a time difficulty. The principals involved here are all out of the country. It is simply a matter of having first gotten into the case, you begin to get some questions, and then you try to get the people there, and it takes time. This is simply explanation, not justification.

Well, perhaps, the solution then is to arrange to take affidavits from these gentlemen, and submit them to government counsel today, and if possible, then continue this motion until this day next week, realizing it is the same day our period expires. We will have to have the papers [16] ready, in the event that motion is denied.



Mr. Moodie: We find it very reluctant to continue the case, we are prepared to argue the motion as filed. We know nothing about the evidence other than set forth in the motion and affidavits attached now. I would object to the continuance of the hearing until next week.

The Court: Offer the objection, and under the circumstances, there is nothing I can do about it.

Mr. Tansill: We have the anomalous situation where the government tells us they know nothing else, and yet we have the people here who can tell them about it, and yet they object to hear it.

The Court: The government said to you as I understand it, you get the motion up, we will hear it and consent to short notice. Now, you are coming in and saying the motion wasn't completed in time, in effect it seems to me that is what you are saying. A motion is supposed to be supported by some kind of adequate material to justify the granting of the motion on the facts shown, at least the prima facie showing. I don't say that the affidavits would necessarily—would be final proof of what was in them, but at least there would be something in the record. Now, there is nothing in the record.

Mr. Tansill: There was that general statement in there we had newly-discovered evidence, and we tried to do the best under the circumstances, to produce the witnesses [17] that would indicate that to us. It seems to me if you are willing to take their affidavits, it would be proper to hear their testimony.

The Court: I am not willing to take their affidavits excepting—I made the suggestion on the assumption it would be acquiesced in. If Mr. Moodie objects, I certainly am not going to hear the motion. He went to a good deal of trouble coming here today, and prepared at your request on short notice, and now you are asking him to reverse the field, so to speak, and wait another week until you get the adequate papers in. So if the government objects, I can't order a continuance.

Mr. Tansill: Do I understand government counsel still to object?

Mr. Moodie: Yes, we object, your Honor.

Mr. Tansill: Well, under those circumstances, if your Honor will permit me, I would be inclined to try to make a proffer of proof here.

The Court: As I said before, I can't prevent you.

Mr. Tansill: Well, at the risk of offending your Honor I would like to make such a brief proffer.

The Court: Very well.

Mr. Tansill: The opinion your Honor has already entered indicates the importance of Mr. Turnbow to the Continental Trading Company. He, in effect, was their [18] principal agent in the United States during those years.

Some of the things Mr. Turnbow didn't discuss in his testimony in this court conceivably are matters about which he knew nothing. On the other hand, some of them are matters of which he personally had knowledge and conducted various negotiations. To illustrate: In 1949, a Mexican race track,

known as the Hippodrome, was owned and controlled by Continental Trading. Mr. Turnbow, as I understand it, conducted extensive negotiations in the United States during 1949 in an attempt to sell that asset. As a matter of fact, it wasn't sold as a result of those negotiations, but it later was sold through the activities of others.

Again——

The Court: May I interrupt you a moment?

Mr. Tansill: Yes, your Honor.

The Court: I will try not to, but I like to help. Do I understand that is one of the things you are relying on as evidence that would be testified to by these witnesses?

Mr. Tansill: Yes, your Honor.

The Court: That Turnbow conducted the negotiation?

Mr. Tansill: Yes, sir.

The Court: He was on the stand in this proceeding and never mentioned it.

Mr. Tansill: That is right.

The Court: This is what you call newly-discovered [19] evidence?

Mr. Tansill: Yes, sir.

The Court: Thank you.

Mr. Tansill: There are about 7 or 8 instances of this type of thing.

Turnbow and others also negotiated and attempted to sell a subsidiary corporation of this Continental Trading Company, known as Bank Continental, in the United States. This was a wholly-owned subsidiary and the negotiations were

conducted in the United States by agents of Continental during 1949.

The Court: Who are those agents?

Mr. Tansill: Who were the agents?

The Court: Yes.

Mr. Tansill: Mr. O'Connell was president of that bank, and personally conducted money for those negotiations in New York City.

The Court: I thought you were talking about negotiations conducted by Continental Trading.

Mr. Tansill: Through Mr. O'Connell who was an officer and director of that company.

The Court: You said of the bank.

Mr. Tansill: Also, he was president of the bank as well.

The Court: I didn't know that. You said he was an [20] officer of the corporation.

Now was this supposed to be a matter that Mr. Turnbow did know about or didn't?

Mr. Tansill: He knew about it, your Honor.

The Court: I am going to ask you this question, because I think maybe this really may be the crux of this whole thing.

You say this is newly-discovered evidence, newly discovered by whom?

Mr. Tansill: By me.

The Court: By you?

Mr. Tansill: Yes.

The Court: Thank you. You weren't even counsel in the case?

Mr. Tansill: That is correct, your Honor.

The Court: Thank you.

Mr. Tansill: By me in my capacity as present counsel in the case.

The Court: You are not saying it was newly-discovered by the client, or even by the prior lawyer?

Mr. Tansill: Certainly not the latter. As to who discovered it first, Mr. Wenner-Gren, I think, initially raised the question with me, and that provoked a search.

The Court: I am not making myself clear.

The client in this case, I meant, the Continental [21] Trading, Inc., the corporation.

Mr. Tansill: Yes, sir.

The Court: You say it was not known to the corporation at the time of the prior hearing?

Mr. Tansill: Well, the corporation is an artificial person, your Honor. Whether the corporation, through its officers knew about this, it is obvious to me at least some of the officers knew about it, namely Mr. O'Connell, Mr. Greninger, both of whom were officers and directors. This is not new information to them, they knew it all the time. I suspect Mr. Turnbow knew it. Why he didn't testify to it, I suspect again goes back to the——

The Court: You know Mr. Turnbow knew it, because the first one, you said he actually conducted it. The second, you represent he did know about it. I can't recall offhand whether Mr. Turnbow was an officer of the corporation at the time we had the hearing.

Mr. Tansill: He was president during those years, I think.



The Court: At one time.

So I again want to bring you down to the focus of the question. Is it really newly-discovered by anybody but you?

Mr. Tansill: Perhaps that is a fair statement, although certainly it depends on how you interpret "newly-discovered", I may say. [22]

The Court: I am going by what I think the cases show.

Mr. Tansill: I hope we don't rely exclusively on this concept of newly-discovered evidence as a separate little category. We are talking about something rather broad here. Whether it is a mistake, or inadvertence in presenting the case originally, encompassed within an element of newly-discovered evidence, I think we do. So perhaps——

The Court: You don't mean by mistake, do you, a mistake in legal theory?

Mr. Tansill: I do in part.

The Court: Do you know of any case in any jurisdiction anywhere at any time that has ever held that that was a ground for a new trial?

Mr. Tansill: In the civil area.

The Court: Not talking about the criminal cases, —even fraud cases but——

Mr. Tansill: I have not been able to find any, simply because I have not had an opportunity for research of that kind.

The Court: I would be very surprised if you were able to find one.

Mr. Tansill: Well, the word "must" have some significance, as must inadvertence. I suppose it

would be fruitless to speculate as to what they might mean. [23]

The Court: There is such thing as carelessness, if a lawyer has a paper on his desk and does not put it in, that would be inadvertence. But to proceed on the case on a wrong legal theory, and ask the Court when it is all over, and new counsel has been substituted to over turn the whole thing and start all over again, I would be interested if you could find such a case.

Mr. Tansill: I would like to look for it, your Honor.

There is another aspect that I had hoped to shy away from. It is possible that there is a conflict of interest here on the one hand between Mr. Turnbow and Mr. Dobrzensky, as opposed to Continental Trading and its interested beneficial owners.

I am told here had been a falling out at one time between Mr. Turnbow and Mr. Wenner-Gren. I am not in any position to judge whether that had a bearing on Mr. Turnbow's testimony. All I know is what I have been told, namely, that there has been some disagreement between them, and of course we have the possibility that Mr. Turnbow was the president, and Mr. Dobrzensky as another officer in that company conceivably could be under the impact of fiduciary liability should this company be unable to pay its deficiencies.

I suppose there is a potential transferee situation [24] here some place.

I understand that Continental has no assets in the United States today.

Now, I simply raise these to indicate that there may have been possible conflict of interest at the time of the testimony in this case. I can't contribute anything more on that, other than to state it.

If your Honor will hear me, I have a few more——

Mr. Moodie: Your Honor, it seems to the respondent that sort of thing goes beyond the scope of this motion, or leave to file a motion.

The Court: I think we can make better progress, Mr. Moodie, if you let Mr. Tansill complete his statement.

Mr. Moodie: Sure.

Mr. Tansill: In 1949, again there was an attempt to sell another asset in the United States, namely the Pan American Trust Company, which was owned beneficially or controlled by Continental Trading. The negotiations again were conducted in New York City with New York banks.

Once again, in 1949, Mr. Turnbow conducted negotiations with Tidewater in the United States in an attempt to get them into the oil business in Mexico under the auspices of Continental Trading. I am told these negotiations were fairly extensive in 1949.

Also, Mr. Turnbow, I am told, tried to interest [25] Continental in buying the stock of the Golden State Dairy in California during this period. That Golden State Dairy, I understand now, is merged into the Foremost Dairies, of which Mr. Turnbow is now president, one of the largest milk combines in the world.

Now, in 1948, Continental loaned in excess of \$600,000 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States.

Now, to explain this very briefly, you should realize that Continental Trading was a mother corporation. It had over a dozen operating subsidiaries in Mexico, ranging from banks, finance companies, cement plants, race track, and half a dozen milk companies. So it is active—so its activities are not wholly milk, is the point I would like to make, and they implemented, under the original intention with which this company was created, the activities of all their subsidiaries. They actually made possible the purchase of milk products in the United States by these direct loans or indirect loans to several of their Mexican subsidiaries in 1948.

Again, in 1948, negotiations were conducted in New York City with a factor to negotiation alone—a loan of \$350,000 in connection with milk operations in Mexico.

Mr. O'Connell as I understand it participated in [26] those negotiations.

Now, finally—I don't intend to labor this much—during these years, '48, '49, and '50, there was going on a continuous series of negotiations conducted in the great part by Mr. Wenner-Gren himself. This was an attempt to merge the two largest telephone companies in Mexico into one concern. One of these companies was a subsidiary in part of United States interests, the International Telephone and Telegraph Company. The other one was owned pri-

marily by Swedish interests. Over a period of three years, and under specific authorization as shown by the minutes of the Board of Directors of Continental Trading, Mr. Wenner-Gren negotiated in Sweden and in New York with the various interests, and finally culminating these three years of negotiation, in 1950 the acquisitions and mergers were consummated.

In the process of doing this, Mr. Wenner-Gren visited the United States on several occasions, and negotiated extensively with the parent U. S. corporation.

I don't like to suggest that this is the entire story that could be pieced together if given more time. I simply would like to point out that these are some of the indicia that we have uncovered recently of activities, either for or on behalf of Continental in the United States, that go to the question of, was the degree of activity by [27] Continental sufficient to constitute doing a trader business?

I would conclude by saying over and above this there has been no testimony at all to indicate the circumstances under which Continental came into existence. That could be testified to, its purposes, and briefly those were the outgrowth of a Swedish milk corporation activity which was later sponsored by UNICET, under U. N. Auspices, that this was part of an implementation of a program to furnish dehydrated milk products around the world to needy areas. That was one of the principal purposes in back of the formation of this company, and could be testified to by a number of witnesses.



With that, I will conclude.

The Court: Thank you.

I am not going to go into this further, Mr. Moodie, unless there is something you want to say, but I want to ask you what your position about the motion is. You are not prepared to agree to it?

Mr. Moodie: No, we are not. We oppose the motion, your Honor.

The Court: I am going to deny the motion.

The whole situation seems to me not to indicate that we could even get beyond the motion for leave. The motion that is proposed to be made doesn't accord with the rules of the Tax Court; particularly Rule 19, which provides [28] that motion for further trial, and so on, shall not be combined with a motion to vacate a decision.

There is a clear implication in the rules, at least, that the engaging of new counsel is not a reason for doing away with a time limit which otherwise appears in the rule. That is the result of a combination of rules 19, 20 and 27.

This, as a matter of fact, is not even the first motion made to vacate this decision in this proceeding. Possibly that is the reason for the rule. There is not even any reference to this prior motion to vacate, although I am sure we all were aware of it.

But if this motion were granted, it seems to me, it would, for no reason other than the substitution of new counsel, it would make it possible for the cases in Tax Court to be indefinitely prolonged, to be reopened, or innumerable motions to be made, first on one ground, and then on another, for the

effect to be to delay the time when appeals have to be taken, which, of course, would be soon in this case. I don't mean to say I am covering all the difficulties that I see in this motion, but most of all it seems to me that the basis has not been laid for the granting of the underlying motion, even if the motion to file were granted.

Under all the circumstances, I just am unable to see that the petitioner has made an adequate case.

The motion will be denied.

Mr. Tansill: May I thank your Honor anyway for your consideration in setting it down for an early date, and also the Bureau counsel.

The Court: There will be nothing further I take it?

Mr. Tansill: No, your Honor.

(Whereupon, at 12:28 o'clock p.m., the hearing in the above-entitled case was concluded.)

[Endorsed]: T.C.U.S. Filed Dec. 4, 1957.

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[Endorsed]: No. 15912. United States Court of Appeals for the Ninth Circuit. Continental Trading, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: March 4, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15912

CONTINENTAL TRADING, INC.,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

DESIGNATION OF PARTS OF RECORD  
TO BE PRINTED

Comes now the petitioner on review and through its counsel, Fred R. Tansill, hereby designates for printing under Rule 17 that portion of the record certified by the Tax Court of the United States of America as follows:

Docket Entries.

Petition (Including Statutory Notice of Deficiency).

Answer.

Stipulation of Facts with Exhibits I thru XVIII (1)(2)(3), XIX, XX (1)(2), XXI (1)(2)(3)(4)(5)(6)(7), XXII (1)(2), XXIII (1)(2), XXIV, XXV, XXVI, XXVII, XXVIII, XXIX (1)(2)(3), XXX (1)(2)(3)(4)(5) and XXXI, attached.

Supplemental Stipulation of Facts (Exhibits separately certified).

Second Supplemental Stipulation of Facts.

Official Report of Proceedings Before the Tax Court of the United States.

Petitioner's Brief.

Petitioner's Reply Brief.

Memorandum Findings of Fact and Opinion.

Decision.

Motion to Vacate Decision—Denied.

Motion for Reconsideration—Denied.

Motion for Leave to File Motion to Vacate Decision, to Reopen this Proceeding, and to take further Testimony—Denied.

Motion to Vacate Decision, to Reopen this Proceeding, and to take further Testimony with affidavit attached—Lodged.

Petition for Review.

Official Report of Proceedings Before the Tax Court of the United States dated November 27, 1957.

Designation of Contents of Record.

Statement of Points.

Respectfully,

/s/ FRED R. TANSILL,  
Counsel for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 22, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

### STIPULATION

Come now the parties to this proceeding and through their respective counsel stipulate and agree that the following documents, heretofore designated by petitioner for printing as a part of the record, need not be so printed but may be considered by the Court in their original form without the necessity of reproduction in the printed record:

Document No. 8—Description: That portion of Document 8 consisting of all of the exhibits. Document No. 12—Description: Petitioner's Brief. Document No. 16 — Description: Petitioner's Reply Brief.

/s/ FRED R. TANSILL,  
Counsel for Petitioner.

/s/ CHARLES K. RICE,  
Assistant Attorney General,  
Counsel for Respondent.

[Endorsed]: Filed April 7, 1958. Paul P. O'Brien, Clerk.